No. 09-1071

Supreme Court, U.S.
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In The
Supreme Court of the United States

GO DADDY SOFTWARE, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "reasonable belief of conduct made unlawful under Title VII" standard that establishes protected opposition under Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), is met where the plaintiff complained of conduct that does not come close to being unlawful under Title VII's anti-discrimination provisions set forth in 42 U.S.C. § 2000e-2(a)(1).

PARTIES TO THE PROCEEDINGS BELOW

The plaintiff below is Respondent, Equal Employment Opportunity Commission ("EEOC"). The defendant is Petitioner, Go Daddy Software, Inc. ("Go Daddy").

Other than these parties, no other parties to the proceeding, or parent or wholly-owned subsidiary corporations, are known or identified.

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PETITION FOR WRIT OF CERTIORARI

Go Daddy, by and through its counsel, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The published decision of the United States Court of Appeals for the Ninth Circuit appears at *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951 (9th Cir. 2009), and is reprinted in the Appendix to the Petition for Writ of Certiorari ("APP") at pages 1-40. The Final Judgment and Order of the United States District Court of Arizona are not reported, and are reprinted in the Appendix to the Petition for Writ of Certiorari at pages 41-64.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on September 10, 2009. (APP1-40) A petition for rehearing en banc was denied on December 4, 2009. (APP65) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), provides in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Respondent EEOC brought suit against Petitioner Go Daddy on behalf of Youssef Bouamama, a former employee of Go Daddy, alleging that Go Daddy discriminated against Bouamama on the basis of his religion (Muslim) and national origin (Moroccan). The EEOC also brought claims that Go Daddy failed to promote Bouamama to a Sales Supervisor position, terminated him, and retaliated against him in violation of Title VII of the Civil Rights Act of 1964. The case went to trial, and the EEOC prevailed on a single cause of action, as the jury returned a verdict that Bouamama's employment was terminated in retaliation for engaging in protected activity.

At the trial, the EEOC argued that Bouamama's "protected activity" involved his alleged complaint

about an incident in which a new manager, Craig Franklin, asked him about pictures on display in his cubicle. According to Bouamama, the ***totality*** of his exchange with Franklin was as follows:

> Franklin: [Where are these pictures from?]
>
> Bouamama: "Morocco."
>
> Franklin: "Are you from Morocco?"
>
> Bouamama: "Yes."
>
> Franklin: "Are you Muslim?"
>
> Bouamama: "Yes."
>
> Franklin: "You know, you're lucky that I like you." [ER106]

Bouamama testified that in the afternoon of that day, he complained to Heather Slezak, Manager of Human Resources at Go Daddy, about this exchange with Franklin. Bouamama claimed that Franklin "was taking interest about, you know, where I'm from, my religion." [ER107] The district court confirmed **three times** in its Order that this ***single*** complaint was Bouamama's only "protected activity" in support of his retaliation claim. (APP55, 57, 64)

Go Daddy brought a Rule 50(b) motion, arguing (in part) that even if the jury believed Bouamama's testimony about the incident and his complaint, this allegation, as a matter of law, does not amount to "protected activity" under the standard set forth by this Court in *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001). [ER22-25] The district court

granted in part and denied in part the Rule 50(b) motion, providing no analysis pertaining to Go Daddy's *Breeden* argument, other than to state that Go Daddy waived the argument by failing to raise it in its Rule 50(a) motion. (APP44-45) Go Daddy appealed.

Over the forceful dissent of Judge Noonan, the panel majority affirmed the district court's ruling, asserting that the record provides evidence of protected activity under the *Breeden* standard. *Go Daddy*, 581 F.3d at 964. In his dissent, Judge Noonan concluded that the panel majority's decision affirms a jury verdict that is supported by, in his words, "zero evidence," that resulted in a "miscarriage of justice." *Id.* at 969. Judge Noonan further explained that the panel majority's decision wrongfully affirms the district court's decision by "quoting the United States Supreme Court and **flouting** its holdings in *Harris, Faragher* and *Breeden*." *Id.* at 970 (emphasis added). Judge Noonan thus concluded: "In the present case, the EEOC has produced **zero evidence** of protected activity affecting Bouamama's conditions of employment." *Id.* at 969 (emphasis added).

With no evidence of protected activity, the panel majority's decision erroneously affirms the jury's verdict, in stark contrast to this Court's clear guidance in *Breeden*. As a result, this decision returns Ninth Circuit Title VII law to the "general civility code" for the workplace standard that this Court has long rejected, and attempted to correct for the Ninth Circuit with this Court's per curiam decision in

Breeden. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). Thus, yet again, this Court needs to provide corrective guidance to the Ninth Circuit to ensure that the district court dockets in the Ninth Circuit, and potentially other Circuits, will *not* again reopen to Title VII complaints about ordinary tribulations of the workplace. Cases involving the sporadic use of insensitive language, occasional teasing, and isolated or offhand comments, questions, or offensive utterances have all been held to be outside the bounds of Title VII by this Court's holdings in *Oncale*, *Harris*, *Faragher*, and *Breeden*. Allowing this published Ninth Circuit case to stand threatens those important boundaries.

Go Daddy's Hiring And Promotions Of Youssef Bouamama

Go Daddy, the world's largest domain name registrar, is an Internet company that provides services that help companies and individuals establish a presence on the Internet. Robert Parsons is the founder and Chief Executive Officer of Go Daddy. Go Daddy's operations include a Call Center, and its Call Center employees assist customers with questions about purchasing domain names, with technical support needs, and with other Go Daddy services. Go Daddy also has a Tech Support/Web Board department where its employees respond to email requests from customers for assistance with Go Daddy's products.

In September of 2001, Bouamama applied to Go Daddy for employment from a temporary employment agency. [ER56] Brett Villeneuve, the supervisor of Go Daddy's Call Center at the time, interviewed Bouamama for a temporary position. [ER56, 126] During the interview process, Villeneuve learned from Bouamama's résumé and interview that he graduated from the "Université Cadi Ayyad" in Morocco, and that he was fluent in several languages. [ER56-57] With the support of Villeneuve, Go Daddy hired Bouamama, and he started as a temporary employee in its Customer Service, Tech Support/Web Board center on or about September 20, 2001, just a few days after the 9/11 terrorist attacks. [ER102] The Company paid Bouamama $12 an hour as a starting salary. [ER110]

Shortly after Go Daddy hired Bouamama, Villeneuve became the Operations Manager of the entire Call Center, making him responsible for every employee in the customer service center, including the phones and the Web Board. [ER58, 126] Although Bouamama worked primarily on the Web Board, he would also handle phone calls from customers when the caller queue became long. [ER58, 59] During those initial days on the job, Villeneuve received complaints from customers that Bouamama was rude to them on the phone, and that customers did not feel that Bouamama resolved their problems. [ER59, 60]

After Bouamama's initial ninety days of temporary employment, and despite his early performance issues, Villeneuve offered him full-time, regular

employment, raising his salary to $14 per hour, and providing him with medical and dental benefits, paid vacation and holidays, and other benefits of similarly situated, full-time employees at Go Daddy. [ER111]

In 2002, Villeneuve created Team Lead positions in the Call Center. [ER127] Team Leads supervised a small crew of sales representatives. [ER127-28] Along with other individuals, Bouamama applied for a Team Lead position. [ER129] Villeneuve promoted Bouamama to the Team Lead position five days later, which included another salary increase to $16 per hour plus bonus opportunities. [ER63, 103, 130]

Bouamama worked in the Team Lead position for only four months until the position of Inbound Sales Manager became available. [ER64, 112] The Inbound Sales Manager's responsibilities included tracking phone calls, tracking sales numbers from the teams, and correlating and tracking data. [ER64-65, ER178] Although four to five people applied for the position, Villeneuve selected Bouamama for the promotion on July 11, 2002, which included a raise from $16 per hour to a salary of $46,000 per year plus bonus opportunities. [ER65, 113]

Thus, ***in less than two years***, primarily with Villeneuve's support, Go Daddy hired Bouamama as a temporary employee, then ***promoted*** him as a regular, full-time employee with a salary increase and benefits, then ***promoted*** him to the Team Lead position with another salary increase, then ***promoted***

him to the Inbound Sales Manager position with another salary increase.

Go Daddy's Reorganization Of Its Call Center That Eliminated The Positions Of Many Employees, Including Bouamama's Inbound Sales Manager Position

On April 1, 2003, Parsons hired Craig Franklin as Go Daddy's new Director of Call Center Operations to give the Call Center more organization and structure. [ER162, 174] Parsons wanted to bring Franklin's experience to the Company to improve the customer service center. [ER177] Franklin had approximately 20 years of experience with call centers, and had supervised hundreds of employees and dozens of call centers with several prior companies. [ER175] He became the first Director of Call Center Operations at Go Daddy and reported directly to Parsons. [ER163-64; 175-76]

When Franklin started his new position, he quickly determined that to improve customer service, he had to reduce the up to 20 minute waiting period for customers on the phone system. [ER177] Within two days, he decided to eliminate some positions and reorganize the Call Center. [ER165, 177] He recognized a problem with the Team Leaders, as their responsibilities required them to split their time responding to customers *and* managing sales representatives, which resulted in delays in the Company's response to customer requests. [ER176] Franklin

thus decided to eliminate the Team Lead positions, the Inbound Sales Manager position (Bouamama's position), and the Weekend Sales Manager position, and to create up to six new Sales Supervisor positions that would be available to quickly answer questions from team representatives with no duties to be on the phones. [ER169]

Parsons approved Franklin's decision to re-organize the Call Center. [ER71, 74, 177] Franklin alone, however, made the final decision to eliminate the fifteen positions in the reorganization, including Bouamama's Inbound Sales Manager position. [ER179] Franklin never sought or received input about the reorganization from Villeneuve or Slezak, and neither of them were involved in the decision to eliminate Bouamama's Inbound Sales Manager position. [ER66, 131, 159]

On April 4, 2003, Franklin, Villeneuve, and Slezak met with Bouamama and informed him that the Company was eliminating his Inbound Sales Manager position. [ER167-68] Bouamama testified three times at trial that this panel offered him only two options at that April 4 meeting: he could apply for a Sales Supervisor position, or he could "walk away," meaning that he could resign and receive a severance package. [ER105; EEOC SER76; GD SER57-58] Go Daddy's supervisors testified that they also offered Bouamama the opportunity to transition to a Sales Representative position on the Call Center floor, but Bouamama rejected the offer. [ER136-37]

Bouamama applied for the Sales Supervisor position, and was interviewed by Franklin, Villeneuve, and Slezak on April 9, 2003. [ER133] That same panel interviewed fourteen candidates for a total of six Sales Supervisor positions. [ER169] The panelists unanimously selected six individuals among the applicants, and did not select Bouamama. [ER109, 134] The panel's non-selection of Bouamama for the Sales Supervisor position was unanimous because he ranked among the bottom of the applicants for the positions. [ER67, 153] There is no evidence, including testimony from Bouamama, that he was more qualified than the other individuals who were selected for the Sales Supervisor positions. [ER115] On April 14, 2003, the panel notified Bouamama that he was not selected for the Sales Supervisor position. [ER136]

When Parsons learned that Bouamama was not selected for the Sales Supervisor position, he sought to provide him with an opportunity to apply for another position at the Company. [ER75] He enlisted the assistance of Go Daddy's executives. Barbara Rechterman, the Senior Vice President, said that she was creating a Marketing Analyst position that would analyze sales statistics, and would consider Bouamama for the job. [ER77-78] Bouamama applied for the position, but was not hired when he failed to complete a basic assignment as required in the application process. [ER40-41]

Go Daddy's managers testified at the trial that the Company had offered Bouamama the option of returning to the lower level, Sales Representative

position on April 4, then again on April 14 (after he was not selected for the Sales Supervisor position), then again on April 17 (when he failed in his application for the Marketing Analyst position). [ER140, 151; GD SER70-71] Bouamama rejected all three offers, and ultimately resigned from Go Daddy. [*Id.*]

Bouamama testified three times at the trial that Go Daddy ***never*** offered him the option of returning to the Sales Representative position, not on April 4, 2003, or at any time later. [ER105; EEOC SER76; GD SER57-58] The EEOC made the same argument on appeal, twice stating that at the April 4 meeting, Go Daddy never offered Bouamama the Sales Representative position. [EEOC Brief at 8, 44] According to the EEOC, when Go Daddy did not select Bouamama for the Sales Supervisor position on April 14, or the Marketing Analyst position shortly thereafter, Go Daddy terminated him from his Inbound Sales Manager position on April 17, 2003, and declined to offer him a Sales Representative position.

Bouamama's Alleged Protected Activity

On Monday, April 7, 2003, the alleged incident that gave rise to this lawsuit occurred. According to Bouamama, three days after he was notified of the elimination of his Inbound Sales Manager position on Friday, April 4, 2003, Franklin approached his workspace (on Monday, April 7) and asked him about certain pictures in his cubicle. [ER106] Bouamama said they were from Morocco; Franklin then said

"Are you from Morocco?"; Bouamama said "Yes."; Franklin then said "Are you Muslim?"; Bouamama said "Yes"; Franklin then looked at Bouamama and said "You know, you're lucky that I like you," and walked away. [*Id.*]

Bouamama also testified that in the afternoon of that same day, he complained to Slezak:

> I told her that this is the second time that people are concerned and taking interest about, you know, where I'm from, my religion. You know, I can understand that it was happening with Brett [Villeneuve, his former supervisor who hired and promoted him] but this guy here [Franklin], I don't know him and two days ago he came and telling me that he doesn't care about my history and he wanted to eliminate my position. The next day he's taking interest for who I am and where I'm from. So I wanted her to look into it.

[ER107]

The district court confirmed three times in its Order that this ***single*** complaint about the April 7, 2003 exchange was Bouamama's only protected activity in support of his retaliation claim. (*See, e.g.*, APP54 ("This (April 4, 2003) decision was made before Mr. Bouamama's protected activity."); *see also* APP57; APP59)

Moreover, contrary to the EEOC's new argument on appeal, the record proves that Bouamama's

complaint about Franklin's comments **was only directed to the comments themselves**, and was not Bouamama's complaint about the elimination of his Inbound Sales Manager position. Bouamama expressed being "concerned and taking interest about, you know, where I'm from, my religion." [EEOC SER64]

The trial transcript further confirms that Bouamama's complaint was about Franklin's alleged comments about his national origin and religion:

> Q. So you told – you told her this was the second time that somebody had complained – had made **comments** about you?
>
> A. That was, I would say, the second or third time that I spoke to her **about some matters like that**.
>
> Q. So you had gone to Miss Slezak to complain about **comments about your national original and religion before**?
>
> A. That's correct. (emphasis added) [ER108]

The EEOC's closing argument at the trial also focused solely on the purported *offensiveness* of Franklin's alleged *comments*, and never contended that Bouamama's complaint was about the elimination of his job:

> The ***comments*** that he made to Mr. Bouamama may not seem that ***offensive*** to most of us but if you really think about it they're

> very subtle, and in this day and age racism is not like it used to be in the '60s. Racism is subtle. And the fact that he would come to a man he had barely met, did not know anything about him, and say, "You're lucky that I like you," after learning where he's from is ***offensive*** and is unacceptable and should never be accepted in the workplace.
>
> He doesn't deny having a conversation with Mr. Bouamama. He doesn't deny that. He just denies saying that – asking about his national origin or religion and – and making the last ***comment***. But he doesn't deny it, and he knew was – they talked about where Mr. Bouamama was from. (emphasis added) [GD SER11-12]

In sum, Bouamama's complaint pertained only to Franklin's alleged ***comments*** about his national origin and religion.

The EEOC's Lawsuit

The EEOC sued Go Daddy, claiming that Bouamama's religion and/or national origin was a motivating factor for Go Daddy's decision not to select him for the Sales Supervisor position, and the alleged decision to terminate his employment. [ER43-44] The EEOC also alleged that Go Daddy failed to select Bouamama for the Sales Supervisor position and terminated his employment in retaliation for engaging in protected activity. [*Id.*]

At the conclusion of closing arguments, but prior to submitting the case to the jury, Go Daddy brought a Rule 50(a) motion, which included an argument that the EEOC lacked sufficient evidence of retaliation. [ER45-46] The district court took the Rule 50(a) motion under advisement and submitted the case to the jury. [ER46] The jury returned a verdict for the EEOC on one claim: that Bouamama's employment was terminated in retaliation for engaging in protected activity. [ER48]

Go Daddy moved for judgment notwithstanding the verdict, pursuant to Rule 50(b), and, in the alternative, for a new trial pursuant to Rule 59(a). In its Rule 50(b) motion, Go Daddy argued that even if the jury believed that Bouamama complained to Slezak on April 4, 2003, this allegation does not amount to "protected activity" under Title VII. [ER22-24] The district court neither agreed nor disagreed, but rather dismissed this argument as having been waived, stating that Go Daddy failed to raise it in its Rule 50(a) motion. (APP44)

Go Daddy appealed, arguing that the record provides no evidence that Bouamama's alleged complaint of April 7, 2003 amounts to "protected activity" under the standard set forth in *Breeden*, 532 U.S. at 270-71. In a two-to-one opinion (Judges W. Fletcher and Tashima in the majority, Judge Noonan dissenting) the Ninth Circuit panel affirmed. Citing *Breeden*, the panel majority held that there was sufficient evidence to support a reasonable person's conclusion that Bouamama engaged in protected activity. *Go Daddy*,

581 F.3d at 964. The panel majority asserted that Bouamama's protected activity included two separate incidents in the record in addition to the April 7, 2003 incident, and that all of these circumstances provide sufficient evidence of protected activity. *Id.* Judge Noonan's dissent rightly concluded that the panel majority's decision affirmed a jury verdict that lacks the support of any evidence, and resulted in a "miscarriage of justice." *Id.* at 969.

According to the panel majority, Bouamama's first protected activity occurred between December of 2001 and February of 2002 when Villeneuve overheard Bouamama speaking to a customer in French. *Id.* at 955. Bouamama testified that Villeneuve then asked him where he was from, what other languages he could speak, and what religion he was practicing. Bouamama answered that he was Muslim, from Morocco, and was also fluent in French and Arabic. *Id.* Bouamama's testimony did not provide any response from Villeneuve. *Id.* at 967.

Villeneuve remembered the exchange differently, stated that he said to Bouamama that his language fluency was an asset, that he thanked him for helping the customer, and that Bouamama smiled and appeared proud of his skills. *Id.* at 955.

Bouamama did not report the conversation to Slezak in Human Resources until ***six months later***, and never followed up with her about his report. Slezak testified that Bouamama never made the report. *Id.* at 955.

Judge Noonan's dissent correctly concluded that the six months late report was not protected activity. *Id.* at 969. He noted that Bouamama waited six months to report his exchange with Villeneuve, and that in the meantime, Villeneuve had promoted him and significantly increased his salary. *Id.* at 967. The dissent also recognized that Bouamama provided no evidence to contradict Villeneuve's testimony that he saw his fluency as an asset. *Id.* As Judge Noonan concluded: "It is impossible to see Bouamama's conversation with Slezak as an employee opposing unlawful discrimination." *Id.*

The second incident of alleged protected activity considered by the panel majority was Bouamama's overhearing of Villeneuve talking to other employees in a hallway near his cubicle, and making the comment, "The Muslims need to die. The bastard Muslims need to die." *Id.* at 967. [EEOC SER58] Judge Noonan noted that Bouamama did not recall when Villeneuve made the comment, other than it was about the 9/11 terrorists, and that it was not addressed to Bouamama. *Go Daddy*, 581 F.3d at 967. Bouamama also testified that he could "understand" the anger that people had expressed after the 9/11 terrorist attacks, and he ***never complained*** about the comment. *Id.* at 968. Thus, Judge Noonan concluded:

> Bouamama never reported Villeneuve's undated comment about "bastard Muslims" and so it is irrelevant to Bouamama's claim of retaliation: Go Daddy cannot have retaliated

> for a report that was never made. . . . The overhearing of Villeneuve's reaction to 9/11 did not give rise to a reasonable belief that Bouamama's patron and promoter was engaged in unlawful discrimination affecting his employment, nor did this belief lead Bouamama to oppose any employment practice.

Go Daddy, 581 F.3d at 969.

Lastly, the panel majority considered the April 7, 2003 exchange between Franklin and Bouamama. *Id.* at 968. Judge Noonan explained that there was no basis for the panel majority to connect Bouamama's six months' late report about Villeneuve's questions (that occurred between December 2001 and February 2002) to Franklin's April 7, 2003 conversation:

> No evidence exists of any relation whatsoever between Franklin's words and Villeneuve's. There is no pattern of an employment practice created by the two conversations. No reasonable person could use Villeneuve's earlier conversation, which, as already noted, was entirely unremarkable and led on to no negative effects for Bouamama, to interpret Franklin's remarks of over one year later to be more than an "isolated incident."

Id.

Judge Noonan also recognized that Bouamama's report on April 7, 2003 does not meet the standard set by this Court for protected activity:

> Franklin's comment is simply one remark made by a new man on the job. A "recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" [*Faragher*, 524 U.S. at 778] (citation omitted).

Go Daddy, 581 F.3d at 968.

Judge Noonan provided the proper analysis to demonstrate that Franklin's April 7 comment to Bouamama could not have been taken by any reasonable person to be a practice affecting the terms and conditions of employment in violation of Title VII:

> The April 7 report of Franklin's single sentence was, at most, the report of an offhand, isolated comment. Was Franklin's ambiguous comment repeated? No. Was it physically threatening or humiliating? No. Did it interfere with Bouamama's work performance? No. Did it affect his compensation? No. Did it affect his promotion to Sales Supervisor? No. Can this second report to Slezak show a pattern or practice of discriminatory conduct? No. No evidence, under the standard set by the Supreme Court, supported the jury's verdict.

Id. at 969.

Judge Noonan concluded:

> If there is any evidence that Bouamama opposed an unlawful employment practice, the

> verdict should stand. There is none. The result of the trial was a miscarriage of justice. The affirmation of that result is made quoting the United States Supreme Court and flouting its holdings in *Harris*, *Faragher* and *Breeden*.

Id. at 969-70.

REASONS FOR GRANTING THE PETITION

This case squarely presents, on a short and clear record, an important issue that this Court has addressed and settled: Whether the "reasonable belief of conduct made unlawful under Title VII" standard to establish protected opposition under Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), is met where the plaintiff complained of an isolated workplace incident that does not come close to being unlawful under Title VII's anti-discrimination provisions set forth in 42 U.S.C. § 2000e-2(a)(1). This Court answered this question clearly in *Breeden*, holding that a retaliation claim must fail when no reasonable person could have believed that the single incident recounted in *Breeden* violated Title VII's standard. *Breeden*, 532 U.S. at 271. In *Breeden*, this Court reiterated that harassing conduct was actionable under Title VII only if it is so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment. *Id.* at 270. Thus, offhand comments and isolated incidents (unless extremely serious) will not amount to

discriminatory changes in the terms and conditions of employment. *Id.* at 271. This Court also clarified that a retaliation claim must fail if it is based on opposition to isolated conduct that cannot remotely be considered "extremely serious." *Id.*

Nevertheless, the *Go Daddy* decision reverts to the pre-*Breeden* landscape, dismantling the principles established in *Breeden*, *Harris*, *Faragher*, and *Oncale* that a retaliation claim must be based on the employee's opposition to conduct that a reasonable person believes to be extremely serious enough to violate Title VII. Thus, this Court needs to reiterate Title VII's requirements for a retaliation claim, and to ensure that Title VII law in the Ninth Circuit remains aligned with this Court and that of other Circuits. Even more importantly, this Court's intervention is sorely needed to ensure that litigants in this and other Circuits don't see this case as purporting to follow *Breeden* while, as Judge Noonan stated, it is actually "flouting" its holding.

The panel majority's opinion also presents an important issue for employers and employees who need clear guidance on the rights and obligations under Title VII's rules governing the workplace. Many employers maintain operations on a national scale, and the increased mobility of many employees, especially in these challenging economic times, means that both management and employees need clear and uniform guidance on the requirements of Title VII among the Circuits. This Court's correction of the panel

majority's opinion will be critical to maintaining uniformity and clarity in Title VII retaliation law.

This Court's Clarity On The Requirements Of A Retaliation Claim Are Urgent, As Such Claims Remain The Fastest Growing Category Of Discrimination Complaints

According to the EEOC's Charge statistics, from 1997 through 2008, retaliation claims are growing at a faster rate than any other discrimination claim, including claims for race, sex, national origin, age, and disability. *See* EEOC, *Charge Statistics FY 1997 Through FY 2008*, *available at* http://archive.eeoc.gov/stats/charges.html. The number of Title VII retaliation claims has almost doubled in the same period, and had increased to over 30% of all charges filed in 2008. *Id.* There is thus a serious need to reiterate the requirements of a retaliation claim.

The Panel Majority's Opinion Failed To Apply This Court's Precedent In *Breeden*, *Harris*, And *Faragher*

Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter." To determine whether an employer has discriminated against its employee in violation of this provision, a court must

assess the proof of discriminatory treatment claims using the three-stage procedure set forth by this Court:

> First, the plaintiff has the burden of proving a prima facie case of discrimination based on opposition to an unlawful employment practice. *See* [*Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981)]. The plaintiff meets this burden if he shows that (1) he has engaged in statutorily protected expression; (2) he has suffered an adverse employment action; and (3) there is a causal link between the protected expression and the adverse action. (citations omitted).

E.E.O.C. v. Crown Zellerbach Corp., 720 F.2d 1008, 1013 (9th Cir. 1983).

In the *Go Daddy* opinion, the panel majority cited *Breeden* as the controlling law for the retaliation case, but failed to apply it properly. *Go Daddy*, 581 F.3d at 963. As a result, the panel majority erroneously concluded that the jury's retaliation verdict was supported by evidence in the record that Bouamama engaged in protected activity in opposition to an unlawful employment practice.

In *Breeden*, the plaintiff-employee, Shirley Breeden, met with her male supervisor and another male colleague to review reports of job applicants. One report of an applicant disclosed that the applicant once commented to a co-worker, "'I hear making love to you is like making love to the Grand Canyon.'" *Breeden*, 532 U.S. at 269. At the meeting, Ms.

Breeden's supervisor read the comment aloud, looked at Ms. Breeden and said: "'I don't know what that means.'" *Id.* The other male employee then said, "'Well, I'll tell you later,'" and both men chuckled. *Id.* Ms. Breeden complained about the incident to her supervisor, his manager, and to another manager. *Id.* at 269-70. Her retaliation claim asserted that she was punished for her complaints by being transferred, and that her transfer was unlawful retaliation under Title VII. *Id.* at 271-70. This Court precluded the retaliation claim, holding that no reasonable person could have believed that the incident violated Title VII's standard. *Id.*

This Court stated in *Breeden*:

> Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" [*Faragher*, 524 U.S. at 786] (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67, (1986) . . . See also *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 752, (1998) (Only harassing conduct that is "severe or pervasive" can produce a "c nstructive alteratio[n] in the terms or conditions of employment"); [*Oncale*, 523 U.S. at 81] (Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment").

Breeden, 532 U.S. at 270.

This Court also emphasized that courts must not measure workplace conduct in isolation, but decide whether an environment is sufficiently hostile or abusive "by 'looking at all the circumstances', including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Id.* at 270-71 (citing *Faragher*, 524 U.S. at 787-88). Thus, "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher*, 524 U.S. at 788 (citation and internal quotation marks omitted).

In *Faragher*, this Court further explained:

> These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code." Properly applied, they will filter out complaints attacking "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." . . . We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view. (citations omitted).

Id. at 788. Accordingly, in a case of racial harassment, the incidents of environmental harassment "'must be

more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.'" *Id.* at 787 n.1. The "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not sufficiently alter terms and conditions to violate Title VII." *Id.* at 787.

Nevertheless, the panel majority in the instant case concluded that there was evidence to support a reasonable person's conclusion that the conduct to which Bouamama had been subjected at Go Daddy went beyond mere "offhand comments" and "isolated incidents," and thus supported the jury's verdict. *Go Daddy*, 581 F.3d at 964. The panel majority cobbled together three alleged incidents to support its conclusion. But as set forth herein, there is no evidence to connect these separate incidents to indicate a workplace practice, and none of the incidents, taken individually or combined, amount to workplace conduct that a reasonable person could believe to be in violation of Title VII. As Judge Noonan concluded: "If there is any evidence that Bouamama opposed an unlawful employment practice, the verdict should stand. There is none." *Id.* at 969.

1. Bouamama's six months late report about a conversation with Villeneuve provides no evidence to support the jury's verdict

The first incident considered by the panel majority was Bouamama's six months late report about an exchange he had with Villeneuve, his supervisor who

hired, promoted, and managed him during most of his employment at Go Daddy. *Go Daddy*, 581 F.3d at 955. Bouamama testified that on one occasion, between December of 2001 and February of 2002, Villeneuve overheard Bouamama speaking on the phone to a customer in French. *Id.* Villeneuve asked Bouamama where he was from, what other languages he could speak, and what religion he practiced. *Id.* Bouamama answered that he was Muslim, from Morocco, and was also fluent in French and Arabic. *Id.* Bouamama's testimony did not provide any response from Villeneuve. *Id.* at 967.

Bouamama did not report the conversation to Slezak in Human Resources until ***six months later***, and never followed up with her about his report. Slezak testified that Bouamama never made the report.

Villeneuve testified that he never asked Bouamama about his religion or national origin. [ER61] Villeneuve said that he only confirmed with Bouamama that he was speaking French, told him that his fluency in French was an asset, thanked him for helping the customer, and that Bouamama smiled and appeared proud of his skills. [EEOC SER90]

Considering all of the facts before the jury, Judge Noonan correctly concluded that this six months late report "was not protected activity." *Go Daddy*, 581 F.3d at 969. Villeneuve had been Bouamama's "patron and promoter" at Go Daddy, promoting him and increasing his compensation package three times

during the first two years of his employment with the Company, including up to a manager position. *Id.* In early 2002, ***after*** the alleged exchange occurred, Villeneuve created Team Lead positions in the Call Center and *promoted* Bouamama to the Team Lead position, which included a salary increase and new bonus opportunities. *Id.* at 955. Bouamama worked in that position for four months until the position of Inbound Sales Manager became available. Although four or five people applied for that manager position, Villeneuve *selected* Bouamama for that promotion on July 11, 2002, which included another raise plus new bonus opportunities. *Id.* It was *after this second promotion,* and six months after the exchange with Villeneuve when Bouamama first notified Slezak, and never followed up on his report. *Id.*

Applying this Court's standard, it's clear that no reasonable person could have believed that this incident violated Title VII's standard. *Breeden*, 532 U.S. at 271. Looking at all of the circumstances, Villeneuve's questions were not severe or pervasive. Villeneuve claimed that Bouamama's fluency was an asset, and Bouamama provided no evidence to the contrary. *Go Daddy*, at 967. Villeneuve's questions provided no commentary on Bouamama's answers, were not repeated, were not physically threatening or humiliating, and did not interfere with Bouamama's work performance, as he was promoted twice after the exchange.

For example, the Eighth Circuit applied the "demanding" standards of Title VII harassment law

to a plaintiff's claim that his direct manager subjected him to a hostile work environment by making a few offensive comments over a ten-month period. *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1039 (8th Cir. 2005). The plaintiff (Al-Zubaidy), a male Shiite Muslim of Iraqi dissent, brought claims of race, religion, and national origin discrimination when his manager (Unger) laughed at plaintiff's accent and inability to speak English well, referred to him as a "dumb ass," tried to get him discharged, and made a few additional derogatory comments at and about him. *Id.* at 1035. The Eighth Circuit applied this Court's standards under *Faragher*, *Harris*, and *Oncale* to affirm the dismissal of his hostile work environment claims because his workplace was not permeated with severe or pervasive harassment to alter the terms, conditions or privileges of his employment:

> Al-Zubaidy produced only a few comments Unger allegedly made over a ten-month period. Most of these offhand and isolated comments were wholly unrelated to each other and had a tenuous connection to race, sex, religion or national origin. Unger's comments were infrequent, were not severe, never physically threatened Al-Zubaidy, were more akin to mere offensive utterances, and did not interfere with Al-Zubaidy's work performance. Indeed, Al-Zubaidy even received pay raises and a promotion both before and after Unger made these comments. Al-Zubaidy's evidence falls far short of the

> Supreme Court's demanding harassment standards.

Id. at 1039.

Similar to the *Al-Zubaidy* case, no reasonable person could conclude that Villeneuve's isolated exchange with Bouamama involving questions of language fluency, national origin, and religion were severe or pervasive as to alter the terms of Bouamama's employment. *Go Daddy*, 581 F.3d at 967. As Judge Noonan concluded: "It is impossible to see Bouamama's conversation with Slezak as an employee opposing unlawful discrimination." *Id.*

2. Villeneuve's remark in the hallway, which was not addressed to Bouamama, and about which he never complained, provides no evidence to support the jury's verdict

The second incident considered by the panel majority was that Bouamama testified that on one occasion, Villeneuve was standing in the hallway behind Bouamama's cubicle and "made a comment like, 'The Muslims need to die. The bastard Muslims need to die.'" The random comment was about the 9/11 terrorists, was not addressed to Bouamama, and Bouamama provided no date when it was made. Bouamama also said that he could "understand" the anger that people expressed after the 9/11 terrorist attacks. This isolated, random comment provides no evidence to support the jury verdict, as it provides no support for an objectively reasonable belief that a

Title VII violation has occurred. *See Jordan v. Alternative Resources Corp.*, 467 F.3d 378, 380 (4th Cir. 2006) (court denied employee's retaliation claim when his complaint was that he overheard a coworker make a racist comment in his presence).

Moreover, Bouamama ***never complained*** about the comment, and thus the undated comment cannot be considered to support the jury's retaliation verdict. *Go Daddy*, 581 F.3d at 969. To establish a prima facie case of retaliation, Bouamama must show facts of causation, including that Go Daddy was "aware" of his protected activity. *Crown*, 720 F.2d at 1012 n.1. Bouamama's excuse for never making a complaint was his unsubstantiated claim that "[t]here's a culture in Go Daddy. You complain you get fired." *Go Daddy*, 581 F.3d at 956. This bare assertion of his belief that he would have suffered retaliation is insufficient to excuse his failure to complain to human resources. *See Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1195 (8th Cir. 2006) (employee's bare assertion that reporting racist comments made by a coworker and supervisor would be ineffective were insufficient to avoid summary judgment on his hostile environment claim). Because Bouamama never complained about the remark, it simply cannot be the basis of protected activity. *See Crawford v. Metro. Gov't of Nashville & Davidson County*, 129 S. Ct. 846, 850 (2009) (the opposition clause of Title VII requires the employee to oppose, resist, or contend against the employer's unlawful activity).

Judge Noonan correctly determined that Bouamama's testimony about the comment in the hallway provides ***zero*** evidence of protected activity:

> Bouamama was not the addressee of this comment. He did not report it to anyone. His memory of it was disclosed at trial. It is difficult to understand the remark as other than random, not aimed at Bouamama, and expressing what many Americans may have thought about "the bastard Muslims," i.e., the terrorists who had rained terror on New York on 9/11. As Bouamama himself testified, "I understand maybe the anger that some people are expressing." Bouamama did not complain about what he overheard. It is not even clear that he heard the remarks before he told Slezak about the December 2001 conversation. By no stretch were the remarks indicative of any employment practice. Therefore, the chance and unreported remarks generated no protected activity and are irrelevant to Bouamama's claim of retaliation.

Go Daddy, 581 F.3d at 967-68.

Considering *all* of the circumstances, this comment provides no evidence to support the jury's retaliation verdict. *Faragher*, 524 U.S. at 788. Villeneuve's comment was an isolated utterance that was not addressed to Bouamama. While the offhand remark about the 9/11 terrorists may have been unwelcome, it was not extremely serious on its face, as Bouamama acknowledged that he could "understand" the anger underlying the comment. The

comment was not physically threatening or humiliating to Bouamama, and did not interfere with his work performance, as Villeneuve promoted him to a manager position after the incident. Thus, a proper application of the Title VII standard, along with a review of all of the facts demonstrates that there was no basis for the panel majority to utilize this remark as support for the jury's verdict.

3. Bouamama's complaint about Craig Franklin's comments provides no evidence of protected activity, as a matter of law

The third and final incident considered by the panel majority involved an alleged exchange between Bouamama and his new manager, Craig Franklin. Bouamama testified that on April 7, 2003, Franklin stopped by his cubicle and noticed some pictures, and the following exchange occurred between him and Bouamama:

> [Franklin asked] where are these pictures from, and I said Morocco, and he said, "Are you from Morocco?" I said, "Yes." He said, "Are you Muslim?" I said, "Yes." . . . [H]e looked at me and he said, "You know, you're lucky that I like you."

Go Daddy, 581 F.3d at 957.

Franklin testified that he saw the pictures and remarked that they were beautiful and asked where they were from, and that Bouamama told him that they were from Morocco. *Id.* Franklin then said that

he never asked Bouamama where he was from or what religion he practiced, that Bouamama never volunteered that he was a Muslim, and that Franklin never said, "You know, you're lucky that I like you." *Id.*

That same day, Bouamama complained to Slezak:

> I told her that this is the second time that people are concerned and taking interest about, you know, where I'm from, my religion. **You know, I can understand that it was happening with [Brett Villeneuve]** but this guy here [ ], I don't know him and two days ago he came and telling me that he doesn't care about my history and he wanted to eliminate my position. The next day he's taking interest for who I am and where I'm from. So I wanted her to look into it. *Id.* (emphasis added).

At the trial, the EEOC elicited testimony that Bouamama's complaint to Slezak was about Franklin's ***comments*** about his national origin and religion:

> Q. So you told – you told her this was the second time that somebody had complained – had made **comments** about you?
>
> A. That was, I would say, the second or third time that I spoke to her **about some matters like that**.

> Q. So you had gone to Miss Slezak to complain about **comments about your national original and religion before**?
>
> A. That's correct. (emphasis added) [ER108]

The EEOC did not attempt to relate Franklin's alleged comments back to his decision (made four days prior) to eliminate Bouamama's Inbound Sales Manager position.

Moreover, the EEOC's closing argument focused solely on the purported *offensiveness* of Franklin's *comments*, and never argued that Bouamama had complained about Franklin's earlier decision to eliminate his position:

> The ***comments*** that he made to Mr. Bouamama may not seem that ***offensive*** to most of us but if you really think about it they're very subtle, and in this day and age racism is not like it used to be in the '60s. Racism is subtle. And the fact that he would come to a man he had barely met, did not know anything about him, and say, "You're lucky that I like you," after learning where he's from is ***offensive*** and is unacceptable and should never be accepted in the workplace.
>
> He doesn't deny having a conversation with Mr. Bouamama. He doesn't deny that. He just denies saying that – asking about his national origin or religion and – and making the last ***comment***. But he doesn't deny it, and he knew was – they talked about where

> Mr. Bouamama was from. (emphasis added) [GD SER11-12]

Thus, the record is clear that Bouamama's complaint to Slezak was about Franklin's ***comments***, and not about his ***earlier*** decision to eliminate his position. Also, because Bouamama complained to Slezak only ***after*** Franklin had already decided to eliminate his Inbound Sales Manager position, which was the position from which he separated on April 17, 2003, it was simply impossible for Bouamama's separation from the Company to be the result of retaliation.

Recognizing that Bouamama's complaint could not survive the *Breeden* standard, the EEOC raised a new argument to the Ninth Circuit. Instead of Bouamama's original complaint in the record about Franklin's comments and questions about his ethnic origin and religion, the EEOC argued on appeal that Bouamama's complaint was "that his job may have been eliminated by Franklin because of Bouamama's national origin or religion." [EEOC Brief at 38] The EEOC should have been estopped from making this new argument, which is directly contradicted by the trial record. *Helfand v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997) (judicial estoppel precludes a party from taking inconsistent and manipulative assertions in different courts).

Moreover, there was no basis for the panel majority to find a "strong nexus" between Franklin's comments and the terms of Bouamama's continued

employment. *Go Daddy*, 581 F.3d at 964. As set forth above, Bouamama's complaint pertains only to Franklin's comments. Also, the jury returned a verdict for Go Daddy on Bouamama's retaliation complaint relating to his non-selection for the Sales Supervisor position on April 14, 2003, which was seven days ***after*** the comment on April 7, 2003, and thus the record provides no support for any nexus. [ER48]

Furthermore, Judge Noonan properly explained that the panel majority's attempt to connect Villeneuve's six months' late report to Franklin's conversation which occurred over a year later was completely unjustified:

> No evidence exists of any relation whatsoever between Franklin's words and Villeneuve's. There is no pattern of an employment practice created by the two conversations. No reasonable person could use Villeneuve's earlier conversation, which, as already noted, was entirely unremarkable and led on to no negative effects for Bouamama, to interpret Franklin's remarks of over one year later to be more than an "isolated incident."

Go Daddy, 581 F.3d at 968.

Indeed, the record presented to the jury provides no support for the panel majority's effort to connect the three incidents. Bouamama's testimony confirms no link between his exchanges with Villeneuve and then with Franklin a year later. He testified that in

his complaint to Slezak he **could "understand" Villeneuve's questions** almost a year earlier, **but not Franklin's**. So Bouamama understood a clear distinction between the two exchanges, as Villeneuve's questions about his language fluency on the phone were understandable, but Franklin's questions and comments at his cubicle a year later were not as clear to him. Bouamama also testified that he could "understand" the anger people expressed about the 9/11 attacks relating to Villeneuve's "Muslims must die" comment made in the hallway, about which he never complained. Thus, Bouamama's testimony itself demonstrates **no connection** between the three alleged incidents.

Moreover, the District Court's Rule 50 Order **thrice** confirmed that Go Daddy eliminated Bouamama's Inbound Sales Manager position on April 4, 2003 ***before*** he engaged in protected activity, clarifying that the April 7, 2003 complaint to Slezak is the only possible protected activity. (APP55, 57, 64) This further contradicts the panel majority's effort to cobble together the other two incidents with the April 7, 2003 conversation with Franklin.

With the April 7, 2003 conversation as the alleged protected activity, the facts are clear that Bouamama did not experience more adverse behavior than the explicit and derisively sexual comments complained of by Shirley Breeden:

Ms. Breeden's facts:

Ms. Breeden's supervisor reads aloud, "'I hear making love to you is like making love to the Grand Canyon.'" Her supervisor then looked at her and said, "'I don't know what that means.'" Another male employee responds, "'Well, I'll tell you later,'" and both men chuckled.

Breeden, 532 U.S. at 269.

&

Mr. Bouamama's facts:

Franklin: [Where are these pictures from?]

Bouamama: "Morocco."

Franklin: "Are you from Morocco?"

Bouamama: "Yes."

Franklin: "Are you Muslim?"

Bouamama: "Yes."

Franklin: "You know, you're lucky that I like you."

[Franklin then walked away]

Compared to the facts in *Breeden*, Bouamama's complaint amounts to, at worst, an isolated incident that cannot be remotely considered "extremely serious" as the cases require. *Breeden*, 532 U.S. at 271.

The post-*Breeden* case of *George v. Leavitt*, 407 F.3d 405 (D.C. Cir. 2005) further demonstrates how

the record in this case provides no evidence to support the jury verdict. In *George*, the plaintiff (Diane George) a woman from Trinidad and Tobago, complained to her manager that on separate occasions, three separate co-workers told her to "go back to Trinidad", to "go back to where [she] came from", or to "shut up," and that she should have never been hired. *Id.* at 408. She made additional complaints to management that she was subject to discrimination and harassment, after which she was terminated. *Id.* at 408-10. George then filed claims for discrimination, hostile work environment harassment, and retaliation under Title VII. The district court granted summary judgment, and George appealed.

Citing *Faragher,* 524 U.S. at 788, the D.C. Circuit dismissed the hostile work environment claim on the grounds that the facts alleged by the plaintiff, including being "thrice told" to "go back where she came from," were the sort of "isolated incidents" that the Supreme Court has held cannot form the basis for a Title VII violation. *George,* 407 F.3d at 416. Then, citing *Breeden,* the *George* court dismissed the retaliation claim, concluding that George's complaints did not constitute opposition to a practice made unlawful by Title VII. *Id.* at 417. The *George* court explained that "the incidents of which George complained could not reasonably be thought to constitute an abusive working environment in violation of Title VII." *Id.*; *see also Ngeunjuntr v. Metro. Ins. Co.*, 146 F.3d 464, 467 (7th Cir. 1998) (affirming summary judgment on Title VII claim based on national origin

and religion when offensive comments made to employee to "go back East", along with additional, offensive comments about national origin, race, and religion that employee overheard in the workplace was not an environment sufficiently hostile that a reasonable person would find it abusive); *Canady v. Wal-Mart Stores, Inc.*, 440 F.3d 1031, 1035 (8th Cir. 2006) (affirming summary judgment when supervisor's remark "What's up, my nigga?" was ill-advised attempt at racial humor that was not workplace permeated with discriminatory intimidation, ridicule, and insult).

Judge Noonan provided the analysis required by this Court to show that Franklin's April 7 exchange with Bouamama provides no evidence to support the jury's verdict:

> The April 7 report of Franklin's single sentence was, at most, the report of an offhand, isolated comment. Was Franklin's ambiguous comment repeated? No. Was it physically threatening or humiliating? No. Did it interfere with Bouamama's work performance? No. Did it affect his compensation? No. Did it affect his promotion to Sales Supervisor? No. Can this second report to Slezak show a pattern or practice of discriminatory conduct? No. No evidence, under the standard set by the Supreme Court, supported the jury's verdict.

Go Daddy, 581 F.3d at 969.

CONCLUSION

Petitioner respectfully requests that this Court grant its Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,
v.
GO DADDY SOFTWARE, INC.,
Defendant-Appellant.

No. 07-16190.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 16, 2009.

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Appeal from the United States District Court for the District of Arizona, David G. Campbell, District Judge, Presiding. D.C. No. CV-04-02062-DGC.

Before: W. FLETCHER, JOHN T. NOONAN, and A. WALLACE TASHIMA, Circuit Judges.

Opinion by WILLIAM A. FLETCHER; Dissent by Judge NOONAN.

WILLIAM A. FLETCHER, Circuit Judge:

Youssef Bouamama was terminated from his job at Go Daddy Software, Inc. ("Go Daddy"). The Equal Employment Opportunity Commission ("EEOC")

brought suit against Go Daddy on Bouamama's behalf in federal district court. A jury returned a verdict in favor of the EEOC on the claim that Bouamama had been unlawfully terminated in retaliation for engaging in protected activity.

Go Daddy moved in the district court for a judgment as a matter of law under Federal Rule of Civil Procedure 50(b), arguing that there was insufficient evidence that Bouamama engaged in protected activity; or, if he did engage in protected activity, that there was insufficient evidence that there was a causal connection between that activity and his termination. In the alternative, Go Daddy moved for a new trial under Federal Rule of Civil Procedure 59(a). The district court denied both motions. We affirm.

I. Background

Go Daddy is a for-profit corporation that assists individuals and companies in registering domain names on the Internet. Go Daddy operates a call center from which employees provide sales and technical support to customers over the telephone. Go Daddy also has a Tech Support/Web Board department that responds to customer requests over email.

In September 2001, Bouamama, a Muslim of Moroccan national origin, interviewed for a job at Go Daddy. Brett Villeneuve, a supervisor in the call center, participated in the interview. Go Daddy hired Bouamama on a temporary basis as a Technical Support Representative in the Tech Support/Web Board

department. Bouamama began working on September 20, 2001, for $12 per hour.

Shortly after Bouamama was hired, Villeneuve became the operations manager of the call center, which meant that he was in charge of the employees in both the call center and in the Tech Support/Web Board department. Villeneuve testified that although Bouamama was assigned to the Web Board, he occasionally answered calls for the call center. Some customers complained about Bouamama's manner on the phone. Nevertheless, on December 13, 2001, Villeneuve converted Bouamama to a full-time, regular employee, raising his wage to $14 per hour, and providing him with medical, dental, and disability benefits, and paid vacations and holidays. At trial, Villeneuve described Bouamama as "a good rep. . . . [T]echnically knowledgeable. His typing skills were good. He put out good, solid answers."

Between December 2001 and February 2002, Villeneuve overheard Bouamama speaking to a customer in French. Bouamama testified that "after I finished with the customer [Villeneuve] was asking me about . . . where I'm from and what language I was speaking and what, you know, religion I was practicing." Bouamama testified that he told Villeneuve that he was a Muslim from Morocco who spoke Arabic. He also testified that he "really didn't feel that it was appropriate to ask me this kind of questions but in the meantime, you know, I want a job, we were at war, so I just let it go."

Villeneuve remembered the conversation differently. He testified that overhearing the phone call with the customer was "pretty cool. . . . [W]hen the phone conversation ended, I asked him – I verified that it was French. I thanked him for . . . helping out the customer. I asked him if there were any other languages that he spoke." Bouamama responded that, in addition to English and French, he spoke Arabic. Villeneuve testified that it was a "huge help" to have a representative who spoke other languages. When asked whether Bouamama seemed upset by the question about what languages he spoke, Villeneuve testified, "No, not particularly. . . . [H]e was kind of smiling like he was proud of the fact [that] . . . he's trilingual. That's neat."

In 2002, Villeneuve created "Team Lead" positions. In addition to handling sales and support inquiries from customers, each Team Lead supervised a crew of sales representatives. Bouamama applied to be a Team Lead, but, according to Villeneuve's testimony, he was initially denied the position because of "his abruptness with people, his demeanor, his abrasiveness." Villeneuve testified that Bouamama complained, and that Villeneuve reversed his position, promoting Bouamama to Team Lead on February 25, 2002. Bouamama's wage was increased to $16 per hour.

Shortly after Bouamama was promoted to Team Lead, the position of Inbound Sales Manager became available. Four or five people, including Bouamama, applied for the position, and Villeneuve gave the

position to Bouamama. The promotion took effect on July 11, 2002. In this new position, Bouamama was responsible for preparing reports and for tracking phone calls, sales by individual employees and teams of employees, and sales of different Go Daddy products. Bouamama's compensation was increased to $46,000 per year plus bonus. Bouamama testified that he often worked weekends, without being asked and without being paid overtime or requesting to be paid overtime, so that he could keep up with the demands of the new position.

Bouamama testified that after his promotion to Inbound Sales Manager he complained to Heather Slezak, who worked in Go Daddy's Human Resources Department, about his conversation with Villeneuve that had occurred about six months earlier when Villeneuve overheard Bouamama speaking to a customer in French. Bouamama testified that he could not recall if Slezak promised to speak to Villeneuve about this, or if she said something like Villeneuve "is the way how [he] is, don't worry about him, he don't really mean stuff." According to Bouamama, neither he nor Slezak followed up on this. According to Slezak, Bouamama never complained to her about Villeneuve.

Bouamama testified that, in addition to his comments made following Bouamama's conversation in French, Villeneuve made at least one other discriminatory comment in his presence, saying, "The Muslims need to die. The bastard Muslims need to die." Villeneuve was talking to other employees in the

hallway near Bouamama's cubicle when he made this comment. Bouamama testified that he did not respond to Villeneuve or complain about him because "[w]e were at war. . . . After September 11 things changed, people are hurt, you know, I was hurt . . . and, you know, you try to be compassionate. I understand maybe the anger that some people are expressing. . . ." Bouamama testified further that he did not complain because "[t]here's a culture in Go Daddy. You complain you get fired."

On April 1, 2003, Go Daddy hired Craig Franklin from an outside company to be Director of Call Center Operations. Franklin had 20 years of experience in call centers and had supervised 1,500 employees in his prior job. Villeneuve, who had previously managed the call center, was demoted. He was no longer a member of Go Daddy's Executive Staff, and he lost the authority to hire and fire workers without approval. Villeneuve reported to Franklin.

On his second day on the job, Franklin reorganized Go Daddy's call center. He testified that in planning the reorganization, he did not solicit advice from Villeneuve or Slezak. Franklin decided to eliminate thirteen Team Lead positions, the Weekend Sales Manager position, and the Inbound Sales Manager position held by Bouamama. Franklin testified that he did not examine the competencies of any of the individuals holding the positions before he decided to eliminate them. Franklin created four new Sales Supervisor positions that employees, including

those whose positions had been eliminated, could apply for.

On April 4, 2003, Franklin, Villeneuve, and Slezak met with Bouamama and informed him that his position was being eliminated. According to Bouamama, he was told that he could apply for one of the new Sales Supervisor positions or "walk away." When asked what he understood the phrase "walk away" to mean, Bouamama testified, "Well, somebody repeat that five times to you it means quit on your own. That's what it means." During cross-examination, Bouamama was asked again if he had been told what would happen if he "didn't apply for the [new] position or if [he] didn't get the position." Bouamama responded:

> A: Yes, sir.
>
> Q: You were told you could take a position back on the floor, answering the phones, or you could accept a severance package.
>
> A: Accept a severance package?
>
> Q: Isn't that what they told you?
>
> A: No. They told me that, you know, you can apply for this position and – you know, or you can walk away.

This testimony by Bouamama about his options conflicts with the testimony of others. Villeneuve testified that employees who applied unsuccessfully for the Sales Supervisor positions "had two options. If you didn't get the position, you could go back to the

phones, with a – we changed your pay rate so they weren't starting out at base all over again. We increased their pay based on tenure. . . . If you chose not to go back to the phones, you could leave the company, and we had a severance package for everybody." Franklin testified similarly, stating that "we encouraged" applicants who did not get the Sales Supervisor position "to go back to the phones."

During the morning of April 7, 2003, Franklin stopped by Bouamama's cubicle. Bouamama testified as follows:

> A: . . . . I was working on my cubicle, Mr. Craig Franklin show up around like 8:30, nine o'clock in the morning and he came around me and he saw some pictures in my cubicle and trouble with the conversation started with where are these pictures from, and I said Morocco, and he said, "Are you from Morocco?" I said, "Yes." He said, "Are you Muslim?" I said, "Yes."
>
> And by the time I was going to engage the conversation with him I kind of like look at him in the face why he's asking me these questions and he looked at me and he said, "You know, you're lucky that I like you," and he walked away to his desk.
>
> Q: So you didn't say anything in response?
>
> A: I didn't get a chance to talk to him.

> Q: Did you have any statistical information in your cubicle that Mr. Franklin was there to obtain?
>
> A: Mr. Franklin, you know, he's the new director of the Call Center. He has access [t]o any information he wants to without really asking me. As a matter of fact, I volunteered to give him an update about the department. He cancelled three times the meeting.
>
> Q: So he could have obtained statistical information from other locations, is that right?
>
> A: That's correct.

Franklin recalled the conversation differently. He testified that he saw the pictures and remarked that they were beautiful and asked where they were from. Bouamama told him that they were from Morocco. Franklin testified that he did not ask Bouamama where he was from or what religion he practiced. He further testified that Bouamama did not volunteer that he was a Muslim and that he, Franklin, had not said, "You know, you're lucky that I like you."

Bouamama testified that during the afternoon of April 7, after the exchange with Franklin, he complained to Slezak in the Human Resources department of Go Daddy:

> Q: What did you tell her?
>
> A: I told her that this is the second time that people are concerned and taking interest about, you know, where I'm from, my

> religion. You know, I can understand that it was happening with [Villeneuve] but this guy here [Franklin], I don't know him and two days ago he came and telling me that he doesn't care about my history and he wanted to eliminate my position. The next day he's taking interest for who I am and where I'm from. So I wanted her to look into it. She said that she will look into it.
>
> Q: So you told – you told her this was the second time that somebody had complained – had made comments about you?
>
> A: That was, I would say, the second or third time that I spoke to her about some matters like that.
>
> Q: So you had gone to Miss Slezak to complain about comments about your national origin and religion before?
>
> A: That's correct.

Slezak denied that Bouamama ever complained to her.

On April 9, 2003, Franklin, Villeneuve, and Slezak interviewed Bouamama for one of the Sales Supervisor positions. The panel interviewed thirteen other candidates during that day and the next. The panelists unanimously agreed to hire six of the candidates, two more than Franklin originally planned. Bouamama was not among those hired. According to Villeneuve's testimony, Bouamama ranked "[l]ower, towards the bottom of the frame" compared to other

candidates. Villeneuve also testified that neither religion nor national origin played any role in the panel's decisions.

Slezak testified that the panel met with Bouamama on April 14 and told him that he did not get a Sales Supervisor position. According to Slezak, "We thanked him for his time, encouraged him to stay with the organization because there would be opportunity in the future, and presented him the same options to retain a position . . . or take a severance package and leave the company." This is consistent with the testimony of Villeneuve and Franklin that Bouamama, like other unsuccessful candidates, had the option to "go back to the phones." According to Slezak, "all of the unsuccessful candidates, aside from Mr. Bouamama, selected right then and there to retain a position with the company as an inbound Sales Representative." According to Franklin, Bouamama said "I'm not going back to the phones." Slezak testified that the panel gave Bouamama two days to make a final decision.

Bouamama testified that the purported meeting with the panel on April 14 never took place. He testified that he learned that he did not get the Sales Supervisor position directly from Bob Parsons, Go Daddy's CEO, on April 14. According to Bouamama, Parsons called him into his office, told him that he did not get the Sales Supervisor position, and told him that he would be doing "sales statistics" for the company. Bouamama testified that Parsons said, "I don't want you [to] worry about what's going on in the

sales department[,] and I want you to be my ears and my eyes for the company." According to Bouamama, "[m]y understanding was that [I would] wait two weeks for the transitions and help [Franklin] and all the others as to . . . what they need[ed] to do on the department and then I will be moving to another department doing statistics, sales or statistics analysis."

Parsons' testimony was inconsistent with Bouamama's. Parsons testified that Bouamama called him to express his disappointment at not getting the Sales Supervisor position. Parsons testified that he promised Bouamama that he "would see what I could do." He further testified that he explained to other executives that he thought Bouamama "was a good employee" and that "because of – of his personality issues, with his abrasiveness, particularly with female employees, that maybe a supervisor position for now was not a good idea for him, but maybe there was something else in the company." He testified that another executive, Barbara Rechterman, mentioned that she was planning to create a marketing analyst position, and she and Parsons agreed that Bouamama, who had a background in mathematics, might be a good fit for it.

Bouamama testified that at the end of the day on April 14, he passed Franklin's office on the way to the parking lot, and "the first thing that [Franklin] said is come here, the F word. You know, I look at him like, 'What?' And he said, 'Come here.'" According to Bouamama, Villeneuve and Slezak were in the room.

Bouamama testified that he responded, "Hey, you know, I just spoke to Mr. Bob Parsons" and that he then went home.

Bouamama testified that on the morning of April 15, 2003, he met with Rechterman to discuss the marketing analyst position, and that she asked him to write a report "related to sales product and cost" and to deliver it to her by noon. He further testified that he emailed her a "preliminary report" around 11:30 and asked if it was satisfactory. Rechterman did not respond. Bouamama sent her a final report around 2:30, and again she did not respond. Bouamama testified that he went to Rechterman's office at about 3:00 to inquire about the report, and that the first thing she said was "I don't know [why] they send you to my department. You need to go ask Mr. Craig Franklin why you didn't get the Sales Supervisor position." Bouamama testified that he went to speak to Franklin, whose first words were, "Oh, I thought I took care of you." He testified that Franklin said he had to talk to Rechterman. Bouamama testified that he had been at work for ten hours at that point, and that he responded, "I'm tired of all this, I'm going home."

Rechterman recalled her interaction with Bouamama differently. She testified that she gave Bouamama a project involving "conversion rates," which were the "basis of the analysis in [her] department," and that she explained the project to him twice, initially and when Bouamama came back to her with questions. She testified that she did not give

him a deadline and that it was "not a difficult project at all." She further testified that Bouamama's final product was "inaccurate" and "wrong" and that she told him that she "didn't think it was going to work out for him in an analytical role."

On the morning of April 17, 2003, Bouamama called in sick and went to the EEOC. Bouamama testified that he "was there to find out what are my rights. . . . I went to EEOC to find out there is something that is going on to me, do you think that this company is doing something wrong or not?" On a questionnaire asking him to describe the harm for which he was filing a complaint, Bouamama wrote, "in process of being demoted or choice to walk away. [B]een asked so many time[s] [w]here I am from and [w]hat religion I practice." After completing the questionnaire, Bouamama had a two-hour interview with an EEOC investigator.

Bouamama testified that he went to work on the afternoon of April 17, 2003, in response to a telephone call from Slezak, who said "there is something urgent that we need to talk about." He met with Slezak and Franklin. According to Bouamama, Slezak said, "You did not get the Sales Supervisor position and you're not going to go back to the floor." He testified that she continued, "This is how it is . . . effective today immediately. You are no longer with the company." He testified that Slezak offered him the severance package. When asked whether Slezak or Franklin offered him the sales representative position – i.e., a return to the phones – Bouamama testified, "No. They never

did." When asked if he would have taken such a position if it had been offered to him, Bouamama testified, "I will. I'm not a quitter. I will go back to the floor and I will prove myself again and I will pro[ve] them wrong." When asked if he left his job voluntarily, he testified, "No, I did not."

On or before April 29, 2003, Bouamama signed an EEOC "Charge of Discrimination" form. He stated on the form, *inter alia*, that "[o]n April 7, 2003, I was again asked where I was from, my religion and what languages I spoke. I was told that if I was not selected for a supervisory position I could 'go back to the beginning' (meaning I could demote to my original sales position), or I had a choice to 'walk away.'" When asked at trial about the EEOC questionnaire he filled out on April 17 and the Charge of Discrimination form he filled out on April 29, Bouamama stated, "I told [the EEOC investigator] that on my initial . . . first meeting with[Slezak], [Villeneuve] as when they called me they going to eliminate my position I have a choice to apply for it . . . or walk away or go back to the floor." Both the questionnaire and Charge of Discrimination form were introduced into evidence.

The EEOC brought suit against Go Daddy in federal district court on Bouamama's behalf, making essentially two claims – a discrimination claim and a retaliation claim. First, it claimed that religion and/or national origin was a motivating factor in Go Daddy's decision not to promote Bouamama to Sales Supervisor and in its later decision to terminate him.

Second, it claimed that Go Daddy failed to promote Bouamama to the position of Sales Supervisor and later terminated his employment in retaliation for engaging in protected activities.

After closing arguments, outside the presence of the jury, Go Daddy made an oral motion under Rule 50(a) for judgment as a matter of law. In its entirety, the motion was:

> With regard to the Commission's discrimination claims, Go Daddy believes there's no legally sufficient evidence for a reasonable jury to find for the Commission. There's insufficient evidence that any of the panelists commented on or considered Mr. Bouamama's religion or national origin during the selection process for the Sales Supervisor position.
>
> With regard to a separation, there's insufficient evidence that any of the panelists commented on or considered Mr. Bouamama's national origin when they offered him a choice between Sales Representative – going back to the Sales Representative position or offering him a severance agreement.
>
> There's also insufficient evidence that the panel considered his religion, Muslim.
>
> With regard to the comparators [sic], there's insufficient evidence that Go Daddy treated Mr. Bouamama differently than the employees outside his protected class. There's been no evidence at trial regarding the

> national origin or religion of the successful candidates, the unsuccessful candidates, or the decision-makers in this case.
>
> *With regard to the Commission's retaliation claim, there hasn't been any evidence that Miss Slezak told any other panel members regarding the alleged reports made to her by Mr. Bouamama. Mr. Franklin and Mr. Villeneuve both testified that, in fact, Miss Slezak had not reported any protected activity to them, and without this knowledge, knowledge by one of the three panel members is insufficient for the jury to return a verdict on retaliation.*

(emphasis added). The only part of the Rule 50(a) motion relating to the EEOC's retaliation claim was the italicized paragraph. The trial court took Go Daddy's motion "under advisement" and submitted the case to the jury.

The jury returned a verdict in favor of the EEOC on the retaliation claim. The jury otherwise returned a verdict in favor of Go Daddy. The jury awarded Bouamama $5,000 for mental and emotional pain and suffering and $135,000 for lost earnings. The jury also awarded $250,000 in punitive damages.

Following the verdict, Go Daddy filed a renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). In its renewed motion, Go Daddy argued, "Plaintiff failed to present sufficient evidence for a reasonable trier of fact (1) to determine that Bouamama engaged in protected

activity under Title VII to support a retaliation claim, or (2) to determine that a causal connection existed between Bouamama's alleged complaint to Heather Slezak ("Slezak") and his alleged termination." In the alternative, Go Daddy moved for a new trial under Rule 59(a). Go Daddy also moved to reduce the total jury award to $200,000 under 42 U.S.C. § 1981a. The EEOC moved for equitable relief, including "back pay with prejudgment interest" and "reinstatement and/or front pay."

The district court denied Go Daddy's Rule 50(b) and Rule 59(a) motions. The court granted Go Daddy's motion to reduce the jury's total damage award to $200,000. The court granted the EEOC's motion in part, awarding Bouamama $36,552 in back pay and $5,156 in prejudgment interest, but declining to order that he be reinstated.

Go Daddy appeals the district court's denial of its Rule 50(b) motion for judgment as a matter of law and its Rule 59(a) motion for a new trial. For the reasons that follow, we affirm the district court.

II. Standard of Review

"We review de novo the district court's denial of a renewed motion for judgment as a matter of law" under Rule 50(b). *Josephs v. Pac. Bell*, 443 F.3d 1050, 1062 (9th Cir.2006). "[I]n entertaining a motion for judgment as a matter of law, the court . . . may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*,

530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Rather, "[w]e must view the evidence in the light most favorable to the nonmoving party . . . and draw all reasonable inferences in that party's favor." *Josephs,* 443 F.3d at 1062. "The test applied is whether the evidence permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Id.*

A Rule 50(b) motion for judgment as a matter of law is not a freestanding motion. Rather, it is a renewed Rule 50(a) motion. Under Rule 50, a party must make a Rule 50(a) motion for judgment as a matter of law before a case is submitted to the jury. If the judge denies or defers ruling on the motion, and if the jury then returns a verdict against the moving party, the party may renew its motion under Rule 50(b). Because it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation Rule 50(a) motion. Thus, a party cannot properly "raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its preverdict Rule 50(a) motion." *Freund v. Nycomed Amersham,* 347 F.3d 752, 761 (9th Cir.2003) (citing Fed.R.Civ.P. 50 advisory committee's notes to the 1991 amendments ("A post trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.")); *Murphy v. City of Long Beach,* 914 F.2d 183, 186 (9th Cir.1990) ("[Judgment notwithstanding the verdict] is improper if based upon grounds not alleged in a directed verdict [motion]." (brackets in

original)); *see also* Fed.R.Civ.P. 50 advisory committee's notes to the 2006 amendments ("Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion."). However, Rule 50(b) "may be satisfied by an ambiguous or inartfully made motion" under Rule 50(a). *Reeves v. Teuscher*, 881 F.2d 1495, 1498 (9th Cir.1989). Absent such a liberal interpretation, "the rule is a harsh one." *Nat'l Indus., Inc. v. Sharon Steel Corp.*, 781 F.2d 1545, 1549 (11th Cir.1986).

We review a jury's verdict for substantial evidence in ruling on a properly made motion under Rule 50(b). *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 888 (9th Cir.2002). However, in ruling on a Rule 50(b) motion based on grounds not previously asserted in a Rule 50(a) motion, "we are limited to reviewing the jury's verdict for plain error, and should reverse only if such plain error would result in a manifest miscarriage of justice." *Id.* (internal quotation marks and citation omitted); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir.2001). "This exception . . . permits only extraordinarily deferential review that is limited to whether there was *any* evidence to support the jury's verdict." *Id.*

We review the district court's ruling on a motion for a new trial under Rule 59(a) for an abuse of discretion. *McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1032 (9th Cir.2003). The district court's denial of a motion for a new trial is reversible "only if the

record contains no evidence in support of the verdict" or if the district court "made a mistake of law." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir.2007) (internal quotation marks and citations omitted).

III. Discussion

We divide our discussion into two parts. First, we address Go Daddy's appeal of the district court's denial of its motion under Rule 50(b) for judgment as a matter of law. Second, we address Go Daddy's appeal of the district court's denial of its motion under Rule 59(a) for a new trial.

A. Rule 50(b) Motion for Judgment as a Matter of Law

The entirety of Go Daddy's Rule 50(a) argument in the district court on the EEOC's retaliation claim was as follows:

> With regard to the Commission's retaliation claim, there hasn't been any evidence that Miss Slezak told any other panel members regarding the alleged reports made to her by Mr. Bouamama. Mr. Franklin and Mr. Villeneuve both testified that, in fact, Miss Slezak had not reported any protected activity to them, and without this knowledge, knowledge by one of the three panel members is insufficient for the jury to return a verdict on retaliation.

Go Daddy made two arguments in the district court in support of its Rule 50(b) motion on the EEOC's retaliation claim. It repeats those same two arguments to us on appeal.

Go Daddy's first argument in its Rule 50(b) motion is that there was insufficient evidence at trial to show Bouamama engaged in protected activity. Depending on the circumstances, reports of improper workplace behavior can be protected activity under Title VII. Go Daddy contends that it argued in its Rule 50(a) motion that there was insufficient evidence of protected activity by referring to Bouamama's "reports" to Slezak as "alleged." The use of the word "alleged" can be read as an attempt to maintain Go Daddy's position, presented through Slezak's testimony, that Bouamama never registered any complaints about his treatment at Go Daddy. The word "alleged," however, does not advance the argument that any reports Bouamama actually made were not protected activity.

Go Daddy's second argument in its Rule 50(b) motion is that even if there were sufficient evidence that Bouamama engaged in protected activity, there was insufficient evidence that Go Daddy terminated him because of this activity. There are two parts to this argument. First, Go Daddy argues that there was insufficient evidence that Slezak told Franklin and Villeneuve about Bouamama's reports to her. The logical extension of this argument is that if Slezak did not tell them of Bouamama's reports to her, those reports could not have motivated Franklin to terminate

Bouamama. Read fairly, Go Daddy made this argument, and its logical extension, in its Rule 50(a) motion. Second, Go Daddy argues that Franklin had decided to terminate Bouamama on April 4, three days before Bouamama spoke to Slezak. Therefore, Go Daddy argues, Bouamama's protected activity could not have motivated his termination. To the extent that this argument relies on anything other than Go Daddy's argument that there was insufficient evidence that Slezak told Franklin and Villeneuve about Bouamama's reports, it was not made in Go Daddy's Rule 50(a) motion.

We evaluate Go Daddy's argument that any reports Bouamama made were not protected activity under the deferential plain error standard applicable to arguments not made in a Rule 50(a) motion. We also evaluate Go Daddy's argument that there was insufficient evidence that Franklin made the decision to terminate Bouamama after Bouamama engaged in protected activity under the plain error standard. Under that standard, if there is "any evidence" to support the jury's verdict, it must be upheld. *Yeti by Molly*, 259 F.3d at 1109. We evaluate Go Daddy's arguments that there was insufficient evidence both that Bouamama complained to Slezak and that Slezak told Franklin and Villeneuve about Bouamama's reports under the substantial evidence standard applicable to arguments made in a Rule 50(a) motion. Under that standard, the jury's verdict must be upheld if there is "evidence adequate to support the jury's conclusion, even if it is also possible to draw a

contrary conclusion." *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir.2002).

1. Protected Activity

Under Title VII of the Civil Rights Act, an employer cannot "discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . or national origin." 42 U.S.C. § 2000e-2(a)(1). An employer cannot retaliate against an employee for "oppos[ing] any practice made an unlawful employment practice by this subchapter." *Id.* § 2000e-3(a). Under the latter provision, a complaint by an employee that a supervisor has violated Title VII may constitute protected activity for which the employer cannot lawfully retaliate. *See Trent v. Valley Elec. Ass'n, Inc.*, 41 F.3d 524, 526 (9th Cir.1994).

In its brief to us, Go Daddy makes two specific arguments in support of its argument that there is insufficient evidence that Bouamama engaged in protected activity.

First, Go Daddy argues that the jury should not have believed that Bouamama complained to Slezak about what he claimed to perceive as discrimination. In his testimony, quoted above, Bouamama stated that he complained to Slezak either two or three times about what he perceived as discriminatory comments. Slezak testified that he never complained to her. Under the substantial evidence standard, we

hold that Bouamama's testimony is adequate to support the jury's conclusion that Bouamama was more credible on this point, even though it might have been "possible to draw a contrary conclusion." *Pavao,* 307 F.3d at 918.

Second, Go Daddy argues that even if Bouamama did complain to Slezak, this was not protected activity under the Supreme Court's decision in *Clark County School District v. Breeden,* 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001). In *Breeden,* the Court held that "offhand comments, and isolated incidents (unless extremely serious)" do not amount to discrimination. *Id.* at 271, 121 S.Ct. 1508 (internal quotation marks omitted). If a person has been subjected to only an isolated incident, a complaint about that incident does not constitute protected activity unless a reasonable person would believe that the isolated incident violated Title VII. This reasonable person determination requires "[l]ooking at all the circumstances, including the frequency of the discriminatory conduct[ ] [and] its severity," *Breeden,* 532 U.S. at 270-71, 121 S.Ct. 1508 (internal quotation marks omitted).

Go Daddy insists in its brief that Bouamama's complaint to Slezak on April 7 about his exchange with Franklin earlier in the day was, at most, a complaint about an "offhand comment" or an "isolated incident." It writes, "Even assuming the jury completely bought Bouamama's testimony about his alleged *single complaint* to Slezak on April 7, 2003[,] about an incident that occurred earlier that same day,

that conduct fails to reach the bar set [by] the United States Supreme Court in [*Breeden*]." (emphasis in original). Go Daddy's argument ignores Bouamama's actual testimony. As recounted above, Bouamama testified that he complained to Slezak two or three times about comments that had been made about his national origin and religion. His complaint on April 7 about Franklin's comments was only the latest of these. In his testimony, he specifically recounted that he had previously complained to Slezak about a conversation in which Villeneuve, his supervisor, asked about the languages he spoke (French and Arabic) and about his religion (Muslim).

Bouamama also testified that Villeneuve later made a comment near his cubicle, "The Muslims need to die. The bastard Muslims need to die." However, he testified that he did not complain on that occasion because "[t]here's a culture in Go Daddy. You complain you get fired." The fact that Bouamama did not report these comments does not make them irrelevant to the inquiry concerning the reasonableness of his belief that a violation of Title VII had occurred.

"Looking at all the circumstances" requires us to take note not only of all comments of which Bouamama complained but also of the context in which they were made. Franklin's comments on April 7 were not "isolated" from the terms and conditions of Bouamama's employment. At the time of those comments, Bouamama had just received word that his position had been eliminated and that his only option to avoid demotion involved an application process to

be headed by Franklin. There is, thus, a strong nexus between Franklin's comments and the terms of Bouamama's continued employment, as noted by Bouamama himself in his final report to Slezak.

Further, if a person has been subjected to more than one comment, and if those comments, taken together, would be considered by a reasonable person to violate Title VII, that person need not complain specifically about all of the comments to which he or she has been subjected. Unreported comments, in other words, are relevant to the inquiry concerning the reasonableness of the belief that a violation has occurred. In such circumstances, a complaint about one or more of these comments is protected behavior. We do not read *Breeden* to require more.

There is, therefore, evidence to support a reasonable person's conclusion that the conduct to which Bouamama had been subjected at Go Daddy went beyond mere "offhand comments" and "isolated incidents," *id.* at 271, 121 S.Ct. 1508, and that Bouamama's two, and possibly three, complaints to Slezak were therefore protected activity. We hold that this testimony satisfies the "any evidence" standard applicable to a faulty Rule 50(b) motion. *Yeti by Molly*, 259 F.3d at 1109.

2. Causation

We evaluate separately each of Go Daddy's two specific arguments in support of its argument that there was insufficient evidence to support a

conclusion that Bouamama's complaints to Slezak motivated Go Daddy's decision to terminate him.

a. Evidence that Slezak Told Franklin about Bouamama's Complaints

Bouamama testified that he complained about Franklin to Slezak on April 7, 2003. Slezak testified that on April 9 and 10, 2003, she and Franklin, along with Villeneuve, interviewed 14 candidates for the Sales Supervisor positions. After the interviews were complete, she testified that "the three of us, [Franklin], [Villeneuve], and myself . . . started to talk about the candidates." She further testified that on April 11 and 14, 2003, she, Franklin, and Villeneuve met with all 14 of the candidates individually to tell them whether they were selected. Franklin corroborated this testimony. Bouamama testified that on April 14, 2003, when he passed Franklin's office and Franklin said "come here, the F word," Slezak was in Franklin's office.

The district court found, "Mr. Bouamama testified that he was terminated by Mr. Franklin and Ms. Slezak. He also testified that he complained to Ms. Slezak about discriminatory conduct by Mr. Franklin only days before his termination. . . . [T]he Court concludes that the jury reasonably could have found that both Mr. Franklin and Ms. Slezak were aware of the protected activity and that their termination of Mr. Bouamama was in response to that activity."

We agree with the district court. A reasonable jury hearing the testimony just recounted could have concluded that Slezak had ample opportunities to inform Franklin of Bouamama's complaint and had, in fact, done so. We therefore hold, under the substantial evidence standard, applicable to a properly made Rule 50(b) motion, that there was sufficient evidence to support the jury's conclusion.

b. Evidence that Go Daddy Decided on April 4 to Terminate Bouamama

Nothing in the record supports a conclusion that Go Daddy decided on April 4 to terminate Bouamama. Bouamama testified specifically to the contrary, as did Villeneuve, Franklin, and Slezak.

Bouamama testified that he was told during his meeting with Slezak, Franklin, and Villeneuve on April 4 that his position was being eliminated and that he could apply for one of the new Sales Supervisor positions, or that he could "walk away." Later, in response to a separate question about the April 4 meeting, Bouamama testified, "They told me that, you know, you can apply for this position and - you know, or you can walk away." As Bouamama understood the phrase, being told that he could "walk away" did not mean that he was fired. Rather, as recounted above, Bouamama specifically testified that "walk away" meant that he could "quit on his own."

Bouamama also testified that he had been given the option to apply for one of the new Sales

Supervisor positions "or walk away *or go back to the floor*" (emphasis added). This statement is consistent with what Bouamama wrote on the EEOC questionnaire that he filled out on the morning of April 17, before he was terminated. He wrote that he was "in process of being demoted or choice to walk away." It is also consistent with his statement on the EEOC Charge of Discrimination form: "I was told that if I was not selected for a supervisory position I could 'go back to the beginning' (meaning I could demote to my original sales position), or I had a choice to 'walk away.'"

Villeneuve testified that unsuccessful applicants for the Sales Supervisor positions "could go back to the phones." Franklin testified that "we encouraged" applicants who did not get the Sales Supervisor position "to go back to the phones." Slezak testified that on April 14, 2003, after telling Bouamama that he did not get the Sales Supervisor position, "We thanked him for his time, encouraged him to stay with the organization because there would be opportunity in the future, and presented him the same options to retain a position . . . or take a severance package and leave the company."

Based on this testimony, the jury could reasonably conclude that at the time of his meeting with the panel on April 14, 2003, Bouamama had the option of returning to his original sales position at Go Daddy.

Bouamama's and Rechterman's testimony about the additional project assigned to Bouamama are also inconsistent with an April 4 decision to terminate. A jury could very reasonably conclude that the assignment of a new project on April 15 contradicts the assertion Go Daddy now makes. Indeed, the very fact that Bouamama was still at work at Go Daddy on April 15 (and apparently still employed on April 17 when he called in sick) belies a decision to terminate on April 4. By April 14, Go Daddy had eliminated Bouamama's position and determined that he would not receive one of the Sales Supervisor assignments. Yet he continued to show up at work and to complete assignments, even new ones.

To understate the matter, there is evidence that Go Daddy's decision to terminate Bouamama was not made on April 4, but rather was made sometime between April 14, when he was told he could return to his original sales position, and April 17, when he was told that he was terminated. We hold that this evidence satisfies the "any evidence" standard applicable to a faulty Rule 50(b) motion. *Yeti by Molly*, 259 F.3d at 1109.

B. Motion for New Trial

In support of its Rule 59(a) motion for a new trial, Go Daddy essentially repeats the same arguments that we have examined and rejected above. Because the record contains "evidence in support of the verdict," and because Go Daddy has failed to

show that the district court "made a mistake of law," the district court did not abuse its discretion in denying Go Daddy's motion for a new trial. *Molski*, 481 F.3d at 729 (internal quotation marks omitted).

Conclusion

For the foregoing reasons, we affirm the district court's denial of Go Daddy's motion for judgment as a matter of law under Rule 50(a), and we affirm the district court's denial of Go Daddy's motion for a new trial under Rule 59(a).

NOONAN, Circuit Judge, dissenting.

Summary. Summing up the evidence supporting the jury verdict of retaliation by Go Daddy, the majority concludes:

> There is, therefore, evidence to support a reasonable person's conclusion that the conduct to which Bouamama had been subjected at Go Daddy went beyond mere "offhand comments" and "isolated incidents," *Breeden* at 271, 121 S.Ct. 1508, and that Bouamama's two, and possibly three, complaints to Slezak were therefore protected activity. We hold that this testimony satisfies the "any evidence" standard.

Two conversations were reported to Slezak. No evidence was offered of a "possible" third. No rational person could have thought that the two conversations

with two different men in different contexts and at widely separated times constituted a pattern of discriminatory conduct by Go Daddy. Even the jury did not think they did, returning an answer of "No" to the question asking if Go Daddy had discriminated. If a reasonable person could believe, albeit mistakenly, that he was reporting and opposing a pattern of discrimination, his opposition would be protected. But Bouamama did not report a pattern. At most he reported a single sentence that he deemed discriminatory. So, the evidence that the majority finds supports the jury's findings of liability and imposition of punitive damages is what? If Bouamama did not report discrimination, what did Go Daddy retaliate against? The majority, combing for straws, has not provided any pattern of protected activity on which the retaliation claim could stand.

The majority opinion. The majority opinion sets out carefully and conscientiously the evidence it finds relevant. Faithful to stating the facts, the majority characterizes them in a way that they appear to affirmatively answer the three questions that the jury had to answer affirmatively in order to find in favor of Bouamama, so that the conclusion is:

> (1) Bouamama engaged in protected activity, that is, opposing discrimination under Title VII.
>
> (2) The company . . . terminated him.
>
> (3) The protected activity was a substantial or motivating factor in the company's

action. *See EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012 (9th Cir.1983).

The jury found that neither Bouamama's Moroccan origin nor his Moslem religion motivated Go-Daddy's decision not to promote him to Sales Supervisor. The jury also found that Go-Daddy terminated Bouamama "in retaliation for his engaging in a protected activity" and that Go-Daddy acted with malice or reckless indifference to his protected activity. The jury awarded $5,000 for mental and emotional distress, $135,000 for lost earnings, and $250,000 in punitive damages.

Was there any evidence that Go-Daddy retaliated for Bouamama's performance of protected acts opposing a discriminatory employment practice?

Not every report of an event that an employee perceives as discriminatory activity is protected. In order to constitute protected activity, a complaint must be based on an employee's "reasonable belief" that he is reporting conduct that violates Title VII. *See Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir.1988). What the employee opposes must be "a practice." *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 526 (9th Cir.1994).

Bouamama's alleged protected activity. Let's look at what the majority characterizes as Bouamama's protected activity:

(1) In December 2001 or January 2002, Villeneuve, hearing Bouamama dealing with a caller

in French, asked Bouamama what languages he spoke. He answered, "French and Arabic." In Villeneuve's view Bouamama's fluency was an asset. Bouamama produced no evidence of a contrary evaluation. Villeneuve added to his question about language by asking Bouamama's country of origin and religion. Villeneuve offered no comment on them.

Six months after the questions had been asked, Bouamama told Heather Slezak in Human Resources of the questions. In the meantime, Villeneuve had given Bouamama a promotion and a big increase in salary. It is difficult to understand why, six months after the conversation, Bouamama would complain about it. It is even more difficult to construe two questions following up Bouamama's knowledge of foreign languages as "discriminatory behavior." It is impossible to see Bouamama's conversation with Slezak as an employee opposing unlawful discrimination.

The majority, however, colors Bouamama's conversation with Slezak by what Bouamama did not say to her. At some undetermined time but after 9/11/01, Bouamama heard Villeneuve talking to other employees in a hallway near Bouamama's cubicle. Villeneuve said, "The Muslims need to die. The bastard Muslims need to die." Bouamama was not the addressee of this comment. He did not report it to anyone. His memory of it was disclosed at trial. It is difficult to understand the remark as other than random, not aimed at Bouamama, and expressing what many Americans may have thought about "the

bastard Muslims," i.e., the terrorists who had rained terror on New York on 9/11. As Bouamama himself testified, "I understand maybe the anger that some people are expressing." Bouamama did not complain about what he overheard. It is not even clear that he heard the remarks before he told Slezak about the December 2001 conversation. By no stretch were the remarks indicative of any employment practice. Therefore, the chance and unreported remarks generated no protected activity and are irrelevant to Bouamama's claim of retaliation.

(2) On April 1, 2003, Craig Franklin replaced Villeneuve as Bouamama's immediate supervisor. On April 7, Franklin entered Bouamama's cubicle and began to converse with him. In Bouamama's mind "trouble started" when Franklin asked where the pictures decorating the cubicle came from. Bouamama answered, "Morocco." Franklin asked him if he were from Morocco and if he were Moslem. Bouamama answered, "Yes." Franklin said, "You know you're lucky that I like you." That afternoon, Bouamama told Slezak of the conversation.

It is possible to interpret Franklin's ambiguous "You're lucky . . . " as an implicitly negative comment on Bouamama's origin and religion. However, even if this interpretation is made, Bouamama's report to Slezak could not be classified as an instance of protected activity. Franklin's comment is simply one remark made by a new man on the job. A "recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely

serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 778, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (citation omitted).

The majority cites Bouamama's testimony that he complained to Slezak "two or three times." Bouamama identifies his report on the conversation with Franklin as "the second time" he complained. The record is bare of any other complaint.

Franklin's conversation cannot be read together with Villeneuve's earlier remarks to form a pattern that any reasonable person could interpret as discriminatory. No evidence exists of any relation whatsoever between Franklin's words and Villeneuve's. There is no pattern of an employment practice created by the two conversations. No reasonable person could use Villeneuve's earlier conversation, which, as already noted, was entirely unremarkable and led on to no negative effects for Bouamama, to interpret Franklin's remarks of over one year later to be more than an "isolated incident."

The termination. As the majority relates, upon taking over on April 1, 2003, Franklin immediately reorganized the call center where Bouamama worked, eliminating 13 positions including Bouamama's. There is no suggestion that the reorganization had any discriminatory motive. On April 4, Franklin, Villeneuve, and Slezak told Bouamama that his job was being eliminated. He was told he could apply for a new Sales Supervisor position or "walk away."

On April 7-9, 2003, Franklin, Villeneuve, and Slezak interviewed 13 candidates for the Sales Supervisor position and hired 6, not including Bouamama, who was rated "near the bottom." Bouamama learned that he had not been promoted on April 14. After unsuccessfully doing a marketing report on April 15 for another department of the company, he ended his employment on April 17.

Bouamama's own testimony demonstrates that he believed that Go Daddy terminated him on April 4 unless he won a promotion to the Sales Supervisor position. But the date of April 4 is not critical to this case. Accepting the majority's view that he was terminated April 17, there is no evidence in the record that Bouamama engaged in any protected activity or that any such activity was the cause of an employment action. Bouamama never reported Villeneuve's undated comment about "bastard Muslims" and so it is irrelevant to Bouamama's claim of retaliation: Go Daddy cannot have retaliated for a report that was never made. As for what Bouamama did report, neither Villeneuve's questions nor Franklin's April 7 comment to Bouamama could have been taken by any reasonable person to be a practice affecting the terms and conditions of employment in violation of Title VII. Bouamama's reports of those incidents were not protected activity opposing discrimination by the employer.

Conclusion. The majority cites the controlling law, *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001). Unanimously

reversing our court in a per curiam opinion, the Supreme Court corrected a memorandum disposition of this circuit in favor of Shirley Breeden, an employee who reported an employer's crude sexual comment. The circuit had held that the report was protected activity if Breeden had a good faith belief that the remark was unlawful sexual harassment. The Supreme Court pointed out that Title VII forbids actions that discriminate "with respect to [an individual's] compensation, terms, conditions, or privileges of employment," *Id.* at 270, 121 S.Ct. 1508, citing 42 U.S.C. § 2000e-2(a)(1). Workplace behavior, the Supreme Court explained, must be measured "by 'looking at all the circumstances,' including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Id.* at 270-271, 121 S.Ct. 1508, quoting *Faragher*, quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). If the employee here experienced more than Shirley Breeden did, it does not appear on this record.

In the present case, the EEOC has produced zero evidence of protected activity affecting Bouamama's conditions of employment. The six months late report of Villeneuve's questions was not protected activity. The overhearing of Villeneuve's reaction to 9/11 did not give rise to a reasonable belief that Bouamama's patron and promoter was engaged in unlawful discrimination affecting his employment, nor did this

belief lead Bouamama to oppose any employment practice.

The April 7 report of Franklin's single sentence was, at most, the report of an offhand, isolated comment. Was Franklin's ambiguous comment repeated? No. Was it physically threatening or humiliating? No. Did it interfere with Bouamama's work performance? No. Did it affect his compensation? No. Did it affect his promotion to Sales Supervisor? No. Can this second report to Slezak show a pattern or practice of discriminatory conduct? No. No evidence, under the standard set by the Supreme Court, supported the jury's verdict.

I accept the majority's view that we review the jury's verdict under the plain error standard. Jury verdicts deserve all the deference that the law wisely accords them. But appellate courts, too, have a function in reviewing what the jury did. If there is any evidence that Bouamama opposed an unlawful employment practice, the verdict should stand. There is none. The result of the trial was a miscarriage of justice. The affirmation of that result is made quoting the United States Supreme Court and flouting its holdings in *Harris*, *Faragher* and *Breeden*.

I dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Plaintiff, vs. Go Daddy Software, Inc., Defendant	Case No. CV 04-2062 PHX DGC **FINAL JUDGMENT IN A CIVIL CASE**

This action came on for trial before a jury. The issues have been heard and on December 15, 2007, a jury verdict was rendered. Both parties' filed post-trial motions with respect to the jury's findings and on April 6, 2007, this Court issued an Order on these motions. Pursuant to that Order (Dkt. 204),

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Defendant, Go Daddy Software, Inc. ("Go Daddy") shall pay Mr. Youssef Bouamama $36,552 in back pay plus prejudgment interest in the amount of $5,156.

2. Go Daddy shall pay Youssef Bouamama $195,000 in punitive damages and $5,000 in compensatory damages.

3. Go Daddy shall be enjoined from retaliating against any employee who complains of discrimination, opposes any act or practice made unlawful by Title VII of the Civil Rights Act of 1964, or files a

charge, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing under Title VII.

4. Go Daddy shall comply with the recordkeeping requirements of 29 C.F.R. 1602.14.

5. For a period of 12 months following entry of this judgment, Go Daddy shall post a notice to all employees in at least three prominent in-house locations frequented by Go Daddy's employees. The notice shall explain Go Daddy's responsibilities and rights under Title VII, including the employees' right to complain about or oppose discrimination free from retaliation, and shall provide the addresses and telephone numbers of the Phoenix office of the Equal Employment Opportunity Commission and the Arizona Civil Rights Division.

Dated this 24th day of April, 2007.

/s/ David G. Campbell
David G. Campbell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Plaintiff, vs. Go Daddy Software, Inc., Defendant.	No. CV 04-2062-PHX-DGC **ORDER** (Filed Apr. 9, 2007)

On December 15, 2006, the jury returned a verdict in Plaintiff's favor on a Title VII retaliation claim and awarded $5,000 in compensatory damages, $250,000 in punitive damages, and an advisory verdict of $135,000 in back pay. Defendant has filed a Motion for Judgment as a Matter of Law Pursuant to Rule 50(b), and/or Motion for New Trial Pursuant to Rule 59(a). Dkt. #196. Plaintiff has filed a Motion Regarding Back Pay, Record Keeping and Equitable Relief. Dkt. #197. For the reasons set forth below, the Court will grant Defendant's motion with respect to the statutory cap on compensatory and punitive damages, deny the remainder of Defendant's motion, and grant Plaintiff's motion in part.

I. Defendant's Motion.

A. Motion for Judgment as a Matter of Law – Protected Activity.

Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, Defendant asks the Court to grant judgment in its favor on Plaintiff's retaliation claim. Defendant first argues that the evidence presented at trial was insufficient to demonstrate that Youseff Bouamama engaged in protected activity. Dkt. #196 at 3-5.

Defendant made a Rule 50(a) motion at the close of the evidence. Although Defendant asked the Court to enter judgment as a matter of law on Plaintiff's retaliation claim, Defendant did not argue that the motion should be granted because Plaintiff failed to present sufficient evidence of a protected activity. The sole basis for Defendant's motion was that Plaintiff had failed to present evidence that Ms. Slezak told other members of the promotion panel (Mr. Franklin and Mr. Villeneuve) about Plaintiff's discrimination complaints. Transcript, 12-15-06 at 140-41. "A party cannot raise arguments in its post-trial motion for judgment as a matter of law under Rule 50(b) that it did not raise in its pre-verdict Rule 50(a) motion." *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003). Because Defendant failed to argue that Plaintiff had presented insufficient evidence of a protected activity, Defendant may not make that argument now. *Id.*

B. Motion for Judgment as a Matter of Law – Insufficient Evidence of Nexus.

Defendant argues that Plaintiff failed to present sufficient evidence that Mr. Bouamama's termination was caused by retaliation for his protected activity. In ruling on this argument, the Court must apply the same standard as it would in granting summary judgment. Judgment may be entered for Defendant only if Plaintiff failed to present sufficient evidence for a reasonable jury to rule in Plaintiff's favor. In making this determination, "the court must draw all reasonable inferences in favor of [Plaintiff], and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

Defendant first argues that Plaintiff failed to prove causation because the decision to eliminate Mr. Bouamama's position was made before he engaged in any protected activity. Defendant next argues that any causal link between Mr. Bouamama's protected activity and his termination was broken by Mr. Parson's offer of an opportunity to qualify for an analyst position. Because Defendant failed to make these arguments in its Rule 50(a) motion at the close of the evidence, it cannot make them now. *Freund*, 347 F.3d at 761.[1]

[1] Defendant did not make these arguments in its Rule 50(a) motion, but it did argue that Plaintiff had failed to prove a connection between the protected activity and Mr. Bouamama's

(Continued on following page)

Defendant also argues that Plaintiff presented insufficient evidence that the decision-maker responsible for terminating Mr. Bouamama was aware of his protected activity. The Court disagrees. Mr. Bouamama testified that he was terminated by Mr. Franklin and Ms. Slezak. He also testified that he complained to Ms. Slezak about discriminatory conduct by Mr. Franklin only days before his termination. Viewing the evidence in the light most favorable to Plaintiff and drawing all reasonable inferences in its favor, the Court concludes that the jury reasonably could have found that both Mr. Franklin and Ms. Slezak were aware of the protected activity and that their termination of Mr. Bouamama was in response to that activity.

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termination. Even if the Court were to take a liberal view of Defendant's Rule 50(a) motion, however, these arguments are not well taken. First, as Plaintiff correctly notes, the jury found that Defendant's retaliation resulted in Mr. Bouamama's termination, not in the elimination of his position as Inbound Sales Manager. Defendant presented no evidence that the decision to terminate Mr. Bouamama was made before he engaged in protected activity. Indeed, Defendant claimed that Mr. Bouamama was not terminated at all. Second, whether any causal link between the protected activity and the termination was broken by Mr. Parson's offer of an analyst position was a question of fact for the jury to decide. The jury clearly chose to disbelieve Defendant's assertion that it did not terminate Mr. Bouamama, and also could reasonably have chosen to disbelieve Defendant's assertion that Mr. Bouamama genuinely was offered an opportunity to qualify for an analyst position. The jury also could have concluded that Mr. Franklin and Ms. Slezak decided to terminate Mr. Bouamama as a result of his protected activity regardless of the analyst opportunity.

C. Motion for New Trial Based on the Weight of the Evidence.

Defendant asks the Court to grant a new trial under Rule 59(a) because the jury's verdict is against the clear weight of the evidence. The Ninth Circuit has provided the following guidance for ruling on such a motion:

> "a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. . . . If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial."

Landes Const. Co., Inc. v. Royal Bank of Canada, 833 F.2d 1365, 1371-72 (9th Cir. 1987) (*citing* C. Wright & A. Miller, *Federal Practice and Procedure* § 2806, at 48-49 (1973)).

Having considered all of the evidence presented at trial, the Court does not conclude that a new trial is warranted. Mr. Bouamama testified that he complained to Ms. Slezak on more than one occasion about conduct he believed to be discriminatory. This conduct included Mr. Franklin's inquiry about his religion and national origin and Mr. Franklin's responsive comment that Mr. Bouamama was lucky Mr. Franklin liked him. Mr. Bouamama testified that

he was terminated by Ms. Slezak and Mr. Franklin within a matter of days of his last complaint. The evidence suggested that other individuals denied a promotion to a Sales Supervisor position were offered continuing positions on the sales floor. Although Defendant claimed to have made the same offer to Mr. Bouamama, the jury chose to believe Mr. Bouamama's testimony that he was not given such an option, but instead was terminated by Ms. Slezak and Mr. Franklin. Mr. Bouamama further testified that he was immediately escorted out of the building by Ms. Slezak. From this and other evidence, the jury could have concluded that Mr. Bouamama was terminated in retaliation for his complaints about conduct by Mr. Franklin that he regarded as discriminatory. The issue is not whether the Court would have reached that conclusion, but whether the Court is left with a definite and firm conviction that a mistake has been committed. Mindful of the respect that must be afforded the collective wisdom of the jury, the Court does not conclude that such a mistake occurred in this case.

D. Motion for New Trial Based on Back Pay and Punitive Damages.

Defendant argues that the Court should hold a new trial because the jury awarded Mr. Bouamama $135,000 in back pay. The back pay verdict, however, is merely advisory. The question of back pay is an equitable remedy for the Court to decide. The jury's

advisory verdict certainly is not a basis for a new trial.

Defendant also argues that the jury's award of $250,000 in punitive damages requires a new trial. The Court does not agree. Defendant correctly notes that punitive damages are warranted only if Plaintiff proves that Defendant acted with malice or reckless indifference to Mr. Bouamama's federally protected rights. Dkt. #196 at 12 (*citing Kolstad v. Am. Dental Ass'n.*, 527 U.S. 526, 535 (1999)). The Court concludes, however, that a jury reasonably could have found that this standard was satisfied by Plaintiff's evidence. The most prominent actor in Plaintiff's claim of retaliation was Ms. Slezak. According to Plaintiff's evidence, she was the individual to whom Mr. Bouamama complained, one of two individuals who terminated Mr. Bouamama, and the individual who escorted Mr. Bouamama from the building. She was also Defendant's director of human resources and an individual trained in discrimination law. If the jury accepted Mr. Bouamama's claim of her involvement in his retaliation, the jury also could have concluded that she acted with reckless indifference to the federally protected rights of which she clearly was aware.

E. Statutory Cap on Compensatory and Punitive Damages.

Defendant contends that it qualifies for the $200,000 statutory cap on compensatory and punitive

damages in 42 U.S.C. § 1981a(b)(3)(C) because it had between 200 and 500 employees on the date of Mr. Bouamama's termination. Defendant cites several cases for the proposition that the applicable number of employees must be determined during the year the discriminatory act took place, not during the year in which the Court's judgment is rendered. *See, e.g., Vance v. Union Planters Corp.*, 209 F.3d 438, 446 (5th Cir. 2000). Plaintiff cites no authority to the contrary.

Plaintiff argues that Defendant has failed to present sufficient evidence that it had fewer than 500 employees in each of 20 or more calendar weeks in the year of Mr. Bouamama's termination, as required by the statute. Dkt. #199. Ms. Slezak testified without contradiction, however, that Defendant had approximately 45 employees when she started with the company in December of 2001 and just over 200 employees when Mr. Bouamama was terminated in April of 2003. Dkt. #187 at 132-33. This is sufficient evidence that Defendant had fewer than 500 employees during 20 or more weeks in the year in which Mr. Bouamama was terminated or in the preceding year. The jury's award of compensatory and punitive damages will therefore be capped at $200,000.

II. Plaintiff's Motion.

A. Record keeping.

Section 709(c) of Title VII requires employers to "make and keep such records relevant to the determinations of whether unlawful employment practices

have been or are being committed" and "preserve such records for such periods . . . as the Commission shall prescribe by regulation[.]" 42 U.S.C. § 2000e-8(c). EEOC regulations provide that "[a]ny personnel or employment record made or kept by an employer . . . shall be preserved by the employer for a period of one year from the date of making the record or the personnel action involved, whichever occurs later." 29 C.F.R. § 1602.14 (2000). The regulation also provides that the "employer shall preserve all personnel records relevant to the charge or action until . . . final disposition of the charge or action." *Id.*

Plaintiff argues that Defendant violated these requirements by not preserving the 28 two-page interview questionnaires completed by Messrs. Franklin and Villeneuve during the Sales Supervisor selection process. Dkt. #197 at 2. Ms. Slezak testified that she initially retained these documents, but somehow later misplaced them. Ms. Slezak also testified that she knew she should have preserved the records.

Defendant counters that the interview questionnaires were insignificant sketches of the interviewers' impressions that were used to complete a one-page summary sheet that ranked each of the candidates. Dkt. #198 at 2. Defendant claims the interview sheets were merely rough drafts of the final ranking sheet. *Id.* In the case cited by Defendant, the Seventh Circuit ruled that a company did not err in disposing of individual ranking sheets by different reviewers that were then used to create a composite, final ranking sheet. *See Rummery v. Illinois Bell Telephone*

Co., 250 F.3d 553, 558-59 (7th Cir. 2001). This case is different, however, because Defendant disposed of interview questionnaires consisting of nine questions, not merely individual numerical rankings that were used to produce a one-page summary ranking sheet. Although the information used in making the ranking sheet came from the questionnaires, the questionnaires were not merely rough drafts of the final ranking. *See Favors v. Fisher*, 13 F.3d 1235, 1239 (8th Cir. 1994) (finding company obligated to retain a ten-question test administered to candidates for promotion), The Court finds that Defendant failed to comply with the recordkeeping requirements of 29 C.F.R. § 1602.14. The Court also finds, however, that the failure was inadvertent. This fact will be taken into account in fashioning an appropriate remedy.

B. Back Pay.

Plaintiff asks the Court to award $135,000 in back pay to Mr. Bouamama, consistent with the jury's advisory verdict. Dkt. #194. Victims of discrimination are entitled to back pay under Title VII. *See* 42 U.S.C. § 2000e-5(g)(1); *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1020 (9th Cir. 2000). Mathematical certainty is not necessary. *Kaplan Int. Alliance of Theatrical and Stage Employees*, 525 F.2d 1354, 1362-63 (9th Cir. 1975).

Mr. Bouamama testified at trial that he lost wages of between $120,000 and $150,000. He arrived at these numbers by projecting the amount he would

have made had he stayed in Defendant's employ at a salary of $46,000. Using information from his W-2 tax forms, he then deducted wages he earned at Midland Credit Management after his termination. Defendant presented no evidence on the amount of Mr. Bouamama's lost pay.

Defendant argues that Plaintiff provided insufficient evidence of back pay. Dkt. #198 at 3. Because any evidence of back pay was testimonial and partially based on W-2 forms not admitted into evidence, Defendant claims that "the jury's proposed back pay award of $135,000.00 is not supported by the evidence, is contrary to the law, and a new trial must be granted." *Id.* at 4. In support, Defendant recites the definition of back pay, which is the "difference between actual earnings for the period and those which [Mr. Bouamama] would have earned absent the discrimination by defendant." *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1158 (9th Cir. 1999). Defendant concludes that "Plaintiff failed to provide evidence of either figure – Bouamama's actual earnings after leaving Go Daddy or Bouamama's income had he remained." Dkt. #198 at 4.

As an initial matter, the Court notes again that the jury's advisory verdict is no basis for a new trial. Defendant can urge the Court to reject the advisory verdict or can present additional arguments regarding the appropriate amount of back pay, but the advisory verdict is not a basis for trying this case anew.

Addressing the first issue – Mr. Bouamama's earnings after termination – Defendant cites *Taylor v. Philips Indus. Inc.*, 593 F.2d 783, 787 (7th Cir. 1979), for the proposition that back pay damages are not available when the plaintiff cannot provide any evidence of actual earnings following her discharge. But Plaintiff did provide evidence of Mr. Bouamama's earnings after discharge. Unlike *Taylor*, Mr. Bouamama testified that he used his post-termination W-2 forms to mitigate the back pay award he sought. Defendant presented no evidence to the contrary.

Addressing the second component of the back pay determination – Mr. Bouamama's income had he remained at Go Daddy – Defendant argues that Plaintiff did not provide evidence that Mr. Bouamama would have continued to make $46,000 per year. Defendant notes that Mr. Bouamama's position of Inbound Sales Manager was eliminated and asserts that there is no reliable measure of how much he would have made in a new position. Dkt. #198 at 5.

The Court agrees with part of Defendant's argument. The evidence at trial established that Mr. Franklin embarked upon a significant reorganization of Defendant's sales operation immediately upon his arrival, including elimination of the Inbound Sales Manager position. This decision was made before Mr. Bouamama's protected activity. Mr. Bouamama and a number of other affected employees applied for several new Sales Supervisor positions that were to be created as part of the reorganization. Mr. Bouamama claimed that he was denied the new

position because of his religion and national origin, but the jury rejected this claim. Dkt. #194. The jury also found that Mr. Bouamama would have been denied the Sales Supervisor job even if his protected activity had played no role in Defendant's decision. *Id.* The undisputed evidence further demonstrated that employees who were not promoted to Sales Supervisor were offered positions on the sales floor as Sales Representatives. Thus, had no unlawful retaliation occurred, Mr. Bouamama's Inbound Sales Manager position would have been eliminated, he would not have received the Sales Supervisor position, and he, like the other unsuccessful applicants, would have been offered a position as Sales Representative.

Given these facts, Mr. Bouamama would not have continued to make $46,000 dollars per year had he remained with Defendant. The undisputed evidence at trial demonstrated that unsuccessful applicants who accepted Sales Representative positions received a cut in pay. Trial Exs. 96-99; Transcripts, 12-13-06 at 19-21; 12-14-06 at 247-48. Some of the unsuccessful applicants received $14.40 per hour. Dkt. #201 at 5 n. 2. Although the parties presented no evidence concerning the amount Mr. Bouamama would have received had he become a Sales Representative, the Court finds it reasonable to conclude he too would have been paid $14.40 per hour.

Using this amount, the Court will award Mr. Bouamama a total of $36,552 in back pay. This figure includes two components: (1) $14.40 per hour of back

pay during the eleven months Mr. Bouamama was unemployed after his termination by Defendant, and (2) $1.40 per hour for the remaining time up to the present, during which he has been employed by Midland Credit Management at $13.00 per hour. Trial Ex. 282. The Court arrived at $1.40 per hour by subtracting Mr. Bouamama's Midland wage of $13.00 per hour from the $14.40 he would have earned had he become a Sales Representative at Defendant.[2]

Plaintiff also seeks to recover pre-judgment interest on the back pay award. Dkt. #197 at 5. An award of prejudgment interest serves the goal of making an employee whole after a defendant has violated Title VII. *See Ford v. Alforo*, 785 F.2d 835, 842 (9th Cir. 1986). Plaintiff computed this interest to be $19,043 based on the IRS prime rate and a back pay award of $135,000. The Court has taken judicial notice of the IRS interest rates used for computation of back pay (Dkt. #197, Ex. 5) and has reviewed Plaintiff's methodology in determining the amount of interest, which the Court finds reasonable. The Court has reduced the prejudgment interest proportionately with the reduction of back pay and will award $5,156 of prejudgment interest.

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[2] The Court recognizes that Mr. Bouamama might have received raises in the more than three years since he would have become a Sales Representative at Defendant, but Plaintiff presented no evidence concerning the likely amount of such raises. Nor did Plaintiff present evidence to show that Mr. Bouamama's earning potential would have been greater at Defendant than at Midland Credit Management.

C. Reinstatement and Front Pay.

Plaintiff asks the Court to reinstate Mr. Bouamama to a position comparable in pay and responsibility to Inbound Sales Manager. Dkt. #197 at 6. Alternatively, Plaintiff asks the Court to award Mr. Bouamama three years of front pay at $46,000 per year. *Id.* at 7.

Reinstatement is preferred to front pay under Title VII. *See Cassino v. Reichold Chems., Inc.*, 817 F.2d 1338, 1346 (9th Cir. 1987). Front pay is appropriate when reinstatement is not viable for reasons such as antagonism between the parties or when no position is available due to a reduction in force. *Id.*; *see also Thorne v. City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986); *Cancellier v. Federated Dept. Stores*, 672 F.2d 1312, 1319 (9th Cir. 1982). Ultimately, reinstatement is not a mandatory remedy, but rather "lies within the discretion of the trial court after careful consideration of the particular facts of the case." *Id.*

Defendant argues that Mr. Bouamama is not entitled to reinstatement as Inbound Sales Manager or a comparable position because "[t]he undisputed evidence in the trial record establishes that Go Daddy eliminated the Inbound Sales Manager position *before* Bouamama allegedly engaged in protected activity." *Id.* (emphasis in original). The Court agrees. As explained above, the evidence and jury verdict confirm that if no retaliation had occurred, Mr. Bouamama's Inbound Sales Manager position would have been eliminated, he would not have received the

Sales Supervisor position, and he would have been offered a position as Sales Representative. If the Court were to order reinstatement, therefore, it would be to the lower position of Sales Representative.

The Court concludes, however, that such reinstatement is not warranted. Sales Representative is not truly the position Mr. Bouamama seeks. Plaintiff presented evidence that Mr. Bouamama had been promoted beyond the position of Sales Representative some time before the events at issue in this case, and Mr. Bouamama complained at trial that he was not given the higher position of Sales Supervisor. The evidence further suggested that Mr. Bouamama's previous work as a Sales Representative had been less than fully satisfactory for him and his supervisors. In addition, Mr. Bouamama has been employed since 2004 with Midland Credit Management and presented no evidence to suggest that he has a less promising future with that company than he would have as a Sales Representative at Defendant. What is more, Mr. Bouamama has made accusations of discrimination against managers still at Defendant, has been engaged in litigation against Defendant for several years, and will recover substantial actual and punitive damages in this case. All of these facts convince the Court that reinstatement is neither warranted nor wise. *See Cassino*, 817 F.2d at 1347 (denying reinstatement because of hostility between the parties); *Cancellier*, 672 F.2d at 1319-20 (denying reinstatement because of history of acrimony toward

plaintiff and because plaintiff's verdict was sufficient to make plaintiff whole).

Plaintiff alternatively seeks front pay of $46,000 for three years. Such an award is clearly unwarranted given Mr. Bouamama's current employment at Midland Credit Management and the fact that his position as Inbound Sales Manager was eliminated before he engaged in protected activity. Moreover, Plaintiff presented no evidence from which the Court could conclude that his future earning potential at Midland would be less than his potential at Defendant. This lack of evidence was conceded by Plaintiff's counsel during trial. Transcript, 12-15-06 at 6. Had Plaintiff presented evidence on the issue of front pay, the Court would have sought an advisory verdict from the jury. Given the absence of such evidence, however, the Court concluded not to seek such a verdict, a decision with which Plaintiff's counsel agreed. *Id.* Because Plaintiff presented no evidence of lost future earnings on the part Mr. Bouamama, the Court will deny Plaintiff's request for an award of front pay.

D. Non-Monetary Equitable Relief.

Plaintiff requests several types of non-monetary equitable relief. *See* Dkt. #197 at 8-10. When an employer engages in an unlawful employment practice, a court may "enjoin [the employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which

may include . . . any . . . equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1). "[T]he district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). "Generally, a person subjected to employment discrimination is entitled to an injunction against future discrimination unless the employer proves it is unlikely to repeat the practice." *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1544 (9th Cir. 1987) (citations omitted).

Plaintiff first requests that the Court permanently enjoin Defendant from violating Title VII. Dkt. #197 at 9. Such an injunction would: "(1) instruct [Defendant] that it must comply with federal law, (2) subject it to the contempt power of the federal courts if it commits future violations, and (3) reduce the chilling effect of its alleged retaliation on its employees' exercise of their Title VII rights." *Goodyear*, 813 F.2d at 1544.

Defendant has not carried its burden of proving that it is unlikely to repeat the practice of retaliating against employees who engage in protected activity. Although Defendant states that one of the discriminators, Craig Franklin, is no longer with the company, other alleged discriminators remain. Evidence that Defendant has undertaken Title VII training and education programs fail to prove that no further Title VII violation will occur. *See id.* (stating that an

"employer that takes curative actions only after it has been sued fails to provide sufficient assurances that it will not repeat the violation to justify denying an injunction). Finally, Defendant states that Plaintiff has not proven that Defendant retaliated against other employees either before or after Mr. Bouamama's termination. But as the Ninth Circuit has made clear, it is Defendant's burden, not Plaintiff's to prove that discrimination is unlikely to recur. *See id.* The Court will enjoin Defendants from further violating Title VII.

Second, Plaintiff requests that Defendant "be required to implement injunctive relief, including but not limited to employee training on Title VII and retaliation, post a notice regarding retaliation, review and/or revise its employment discrimination policies and reporting requirements." Dkt. #197 at 9. Defendant responds that it is already conducting training of its employees. On the basis of the evidence presented at trial – evidence which demonstrated that Defendant employs a diverse work force and evidence which was devoid of any suggestion of other discriminatory activity – the Court is unwilling to interfere with Defendant's voluntary Title VII compliance and finds this type of injunctive relief unnecessary. *See* 42 U.S.C. § 2000e-5(g)(1).

Third, Plaintiff requests that Defendant be required to post a notice stating its intent to comply with Title VII and advising employees of their rights for relief from discrimination. Dkt. #179 at 9. Plaintiff believes that "[s]uch notice will serve the dual

purpose of educating Go Daddy's current and future employees regarding their rights and remedies under Title VII and reminding Go Daddy of its obligation to uphold those rights." *Id.* The Court agrees. This type of injunctive relief is minimally intrusive, will provide clear expectations regarding Defendant's conduct, and will identify remedies available to employees who might experience discrimination.

Fourth, Plaintiff asks the Court to require Defendant to comply with the recordkeeping requirements of 29 C.F.R. § 1602.14, as well as to advise the EEOC of all decisions covered by that regulation and to make all records available to the EEOC for inspection. *Id.* Because the Court finds that Defendant failed to follow the recordkeeping requirements in this case, the Court will order Defendant to comply with the requirements of 29 C.F.R. § 1602.14. The Court will not, however, order Defendant to advise the EEOC of all decisions covered by the regulation or to make all records available for EEOC inspection. The evidence at trial demonstrated to the Court's satisfaction that the loss of records in this case was accidental, and the existing regulations and the Court's order will provide sufficient assurances that Defendant will not again violate the recordkeeping requirements.

Finally, Plaintiff asks the Court to impose monitoring and reporting requirements for two years. *Id.* at 10. The Court will deny this relief. The jury rejected Plaintiff's claim that Defendant discriminated on the basis of national origin or religion.

Although the jury found that Defendant engaged in unlawful retaliation, one instance of such conduct in a company that has grown to over 1,300 employees does not warrant the imposition of monitoring and reporting requirements. The substantial monetary judgments imposed by this case, the injunctions that Defendant comply with Title VII and the record-keeping regulations, and the requirement that Defendant post notices concerning Title VII compliance and relief constitute sufficient sanctions for the single instance of retaliation established at trial.

IT IS ORDERED:

1. Defendant's Motion for Judgment as a Matter of Law Pursuant to Rule 50(b), and/or Motion for New Trial Pursuant to Rule 59(a) (Dkt. #196) is **granted** with respect to the statutory cap on compensatory and punitive damages and **denied** with respect to all other requested relief.

2. Plaintiff's recovery of punitive and compensatory damages shall be reduced to a total of $200,000, consisting of $5,000 in compensatory and $195,000 in punitive damages.

3. Plaintiff's Motion Regarding Back Pay, Recordkeeping and Equitable Relief (Dkt. #197) is **granted** in part and **denied** in part as set forth above.

4. Mr. Bouamama is awarded $36,552 in back pay and $5,156 in prejudgment interest.

5. Defendant is enjoined from retaliating against any employee who complains of discrimination, opposes any act or practice made unlawful by Title VII of the Civil Rights Act of 1964, or files a charge, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing under Title VII.

6. Defendant shall comply with the record-keeping requirements of 29 C.F.R. § 1602.14.

7. For a period of 12 months following entry of final judgment, Defendant shall post a notice to all employees in at least three prominent in-house locations frequented by Defendant's employees. The notice shall explain Defendant's responsibilities and the employees' rights under Title VII, including the employees' right to complain about or oppose discrimination free from retaliation, and shall provide the addresses and telephone numbers of the Phoenix office of the Equal Employment Opportunity Commission and the Arizona Civil Rights Division.

8. Within ten days of this order, Plaintiff shall lodge a proposed final judgment accurately reflecting the decisions in this order.

DATED this 6th day of April, 2007.

/s/ David G. Campbell
David G. Campbell
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee, v. GO DADDY SOFTWARE, INC., Defendant-Appellant.	No. 07-16190 D.C. No. CV-04-02062-DGC ORDER (Filed Dec. 4, 2009)

Before: NOONAN, TASHIMA and W. FLETCHER, Circuit Judges.

Judge Fletcher has voted to deny the petition for rehearing en banc and Judge Tashima so recommends. Judge Noonan recommends granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc, filed October 26, 2009, is DENIED.

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(2)

No. 09-1071

In the Supreme Court of the United States

GO DADDY SOFTWARE, INC., PETITIONER

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether sufficient evidence supported the jury's conclusion that Youssef Bouamama had a reasonable belief he had been subjected to conduct made unlawful by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, when he complained to his employer about the possible discriminatory elimination of his position.

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In the Supreme Court of the United States

No. 09-1071

GO DADDY SOFTWARE, INC., PETITIONER

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-40) is reported at 581 F.3d 951. The order of the district court (Pet. App. 43-64) is unpublished but is available at 2007 WL 1076701.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2009. A petition for rehearing was denied on December 4, 2009 (Pet. App. 65). The petition for a writ of certiorari was filed on March 4, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Equal Employment Opportunity Commission sued petitioner in the United States District Court for

the District of Arizona asserting that it violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by discriminating against charging party Youssef Bouamama on the basis of his national origin and religion, and by discriminating against him due to his engagement in activity protected from retaliation under the statute. Gov't C.A. Supp. E.R. 1-2. The jury found for the Commission on the retaliatory discharge claim, and for petitioner on the remaining claims. *Id.* at 8-12. As relevant here, petitioner moved under Federal Rule of Civil Procedure 50(b) for judgment as a matter of law on the retaliation claim. The district court denied the motion because petitioner failed to preserve its argument in a pre-verdict Rule 50(a) motion. Pet. App. 44. The court of appeals affirmed, applying "the deferential plain error standard applicable to arguments not made in a Rule 50(a) motion." *Id.* at 23; see *id.* at 1-40.

1. a. The following evidence was presented to the jury at trial. Petitioner Go Daddy Software, Inc. is a company that registers Internet domain names for websites. Gov't C.A. Supp. E.R. 103. Bouamama first began working for petitioner in September 2001 as a temporary Customer Service/Tech Support/Web Board employee in its call center. *Id.* at 49. Three months later, petitioner converted Bouamama to a permanent full time employee, in the position of Sales Representative. *Id.* at 18-19, 50, 89. In this position, Bouamama provided customer service by telephone and email to petitioner's clients, and also trained new hires in the Sales Representative position. *Id.* at 51.

Brett Villeneuve, petitioner's Operations Manager and the person responsible for the call center, assessed Bouamama's performance as a Sales Representative and observed that while handling customer calls "wasn't his

strongest point," Bouamama "was a good rep," and generally as an employee "[a]ll in all, he's okay. He's got good technical knowledge." Gov't C.A. Supp. E.R. 86-87, 89, 96-97. On February 25, 2002, Villeneuve promoted Bouamama to the Team Lead position. *Id.* at 53, 115-116. In this position, Bouamama supervised and provided training and support to a team of five or six Sales Representatives. *Id.* at 54, 91, 114. Villeneuve noted that, as compared to the other Team Leads at Go Daddy, Bouamama's customer service skills were "[r]ight in there in the middle of them." *Id.* at 92. Bouamama was again promoted by Villeneuve in early July 2002 to the position of Inbound Sales Manager. *Id.* at 78, 94-95. In this position, Bouamama provided support to the Sales Representatives, prepared sales reports and goals, and organized sales contests. *Id.* at 55.

Shortly after making Bouamama a permanent employee, Villeneuve heard Bouamama speaking to a customer in a foreign language and asked Bouamama where he was from, what language he was speaking, what other languages he spoke, and what religion he practiced. Gov't C.A. Supp. E.R. 51-52, 90. Bouamama responded that he was from Morocco, that he had been speaking French, that he also spoke Arabic, and that he was Muslim. *Id.* at 52, 90. After Villeneuve promoted Bouamama to the Inbound Sales Manager position, Bouamama complained to Heather Slezak, petitioner's Director of Personnel, about this questioning from Villeneuve. *Id.* at 28-29, 33, 78, 79. Slezak stated either that she would talk to Villeneuve, or that "[Villeneuve] is the way [he] is, don't worry about him, he don't really mean stuff." *Id.* at 79. Slezak stated that when she receives complaints of discrimination, she speaks to the alleged discriminator, conducts a full investigation of the allega-

tion, and takes any necessary corrective action. *Id.* at 36-37. Although Bouamama expected Slezak to "take [his] complaint into consideration," she never followed up with him. *Id.* at 79.

On another occasion, Villeneuve made a comment in Bouamama's presence, while speaking to other employees, that "[t]he Muslims need to die" or "[t]he bastard Muslims need to die." Gov't C.A. Supp. E.R. 58. Bouamama felt hurt by this comment, but said nothing to Villeneuve because Bouamama understood that at that time "[w]e were at war. * * * After September 11 things changed, people are hurt, you know, I was hurt and, you know, it was devastating for everybody, it was horrible, and, you know, you try to be compassionate. I understand maybe the anger that some people are expressing, and that's why I don't say nothing." *Id.* at 59. Bouamama added that he did not want to "make an issue in the company" or to be looked at as a "troublemaker," and he hoped that "maybe some day they'll see me as Youssef, you know, maybe they'll be more knowledgeable about, you know, my work ethic, my performance and they [will] look at me as Youssef, not as, you know, where he's from, what religion he practice or something like that." *Id.* at 60. Bouamama also added that he did not complain about the "Muslims need to die" comment because "[t]here's a culture in Go Daddy. You complain you get fired." *Ibid.* Bouamama had witnessed that culture in action—seeing others complain and get fired—and he wanted to keep his job. *Ibid.*

In early April 2003, petitioner hired Craig Franklin as the Director of the call center. Gov't C.A. Supp. E.R. 29. Villeneuve stayed on, reporting to Franklin. *Id.* at 42. On April 2, Franklin announced there would be no changes under his management. *Id.* at 61. Bouamama

invited Franklin to attend an upcoming training session Bouamama was conducting in the sales department, in order to bring Franklin up to speed on the functioning of that department. *Id.* at 25, 61-62. Before the training session, Bouamama—who speaks with a "very strong accent" recognized by at least one of Bouamama's co-workers as "Middle East[ern]"—met with Franklin in his office. *Id.* at 43, 44, 61. After Franklin met Bouamama face-to-face for the first time, Franklin cancelled the training session meeting and two other meetings with Bouamama. *Id.* at 62.

Franklin decided instead to reorganize the call center. As part of the reorganization, Franklin chose to eliminate the 13 Team Lead positions, the weekend Operations Manager position, and Bouamama's Inbound Sales Manager position, replacing all with four newly created Sales Supervisor positions. Gov't C.A. Supp. E.R. 20-22; Pet. App. 9. Petitioner encouraged the employees in the eliminated positions to apply for the new Sales Supervisor positions. Gov't C.A. Supp. E.R. 26. Every employee whose position was being eliminated but chose not to apply or was not selected for the Sales Supervisor position had the option of taking a Sales Representative position, or taking a severance package and leaving the company. *Id.* at 99.

On April 4, 2003, Slezak, Villeneuve and Franklin together met with Bouamama to inform him that his Inbound Sales Manager position had been eliminated; they told him he could either apply for the Sales Supervisor position or just "walk away" from petitioner. Gov't C.A. Supp. E.R. 62, 62.5, 63. Franklin stated that he did not care about Bouamama's "background or history with the company, something like that." *Id.* at 62.5. Slezak repeated the "walk away" part of that message to Boua-

mama five times, which Bouamama understood as telling him he should quit. *Id.* at 62.

After this meeting, Franklin stopped by Bouamama's cubicle, looked at Bouamama's pictures, and asked where they were taken.[1] Gov't C.A. Supp. E.R. 63. Bouamama replied that they were taken in Morocco, and Franklin asked if Bouamama was from Morocco and if he was Muslim. *Ibid.* Bouamama answered yes to both questions, and Franklin replied "[y]ou know, you're lucky that I like you," and then walked away. *Ibid.* Later that day Bouamama reported Franklin's comments to Slezak:

> [T]his is the second time that people are concerned and taking interest about, you know, where I'm from, my religion. You know, I can understand that it was happening with [Villeneuve] but this guy here [Franklin], I don't know him and two days ago he came and telling me that he doesn't care about my history and he wanted to eliminate my position. The next day he's taking interest for who I am and where I'm from. So I wanted her to look into it.

Id. at 64. Slezak said she would look into the matter. Pet. C.A. E.R. 107-108.

Almost all the employees affected by Franklin's reorganization, including Bouamama, applied for a Sales Supervisor position. On April 9 and 10, 2003, a panel of petitioner's management personnel—Franklin, Ville-

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[1] Bouamama's trial testimony suggests this exchange and the events immediately following it took place on April 5, while his charge of discrimination filed with the Commission states the exchange it took place on April 7. Compare Gov't C.A. Supp. E.R. 63 with Pet. C.A. E.R. 86-87. In either case, the event fell between the April 4 meeting regarding the elimination of Bouamama's position and his April 17 termination.

neuve, and Slezak—interviewed the Sales Supervisor candidates. On April 14, 2003, Bob Parsons, petitioner's CEO, informed Bouamama that he did not get a Sales Supervisor position. Gov't C.A. Supp. E.R. 65. Parsons told Bouamama that, instead of the Sales Supervisor position, Bouamama would be "doing sales statistics" for the company, and he did not want Bouamama to "worry about what's going on in the sales department." *Ibid.* Bouamama left the meeting with Parsons with the impression that he would "be moving to another department doing statistics, sales or statistics analysis." *Id.* at 67. Unlike every other unsuccessful candidate for the Sales Supervisor position, Bouamama was not offered the opportunity to return to a Sales Representative position. *Id.* at 62.

As Bouamama passed Franklin's office on his way back to his cubicle, Franklin saw Bouamama and said "come here," and called Bouamama "the F word." Gov't C.A. Supp. E.R. 67. Bouamama responded by "look[ing] at him like, 'What?'" and then Franklin again said "come here." *Id.* at 67-68. Bouamama responded that he had just spoken to Parsons, and he went home. *Id.* at 68. That evening, Bouamama received an e-mail from Barb Rechterman, petitioner's Executive Vice President, stating that Bouamama was to meet with Franklin and her. *Id.* at 70, 104.

At that meeting the next day, Rechterman asked Bouamama to prepare a report for her "related to sales product and cost." Gov't C.A. Supp. E.R. 70. The request was made at around 10 a.m., and Rechterman told Bouamama to get it to her by noon. *Ibid.* Bouamama provided Rechterman a preliminary report a half hour early at 11:30 a.m. and asked if his report was what she was expecting. *Id.* at 71. Rechterman did not respond.

Ibid. Bouamama turned in the completed report at 2:30 p.m. and a short time later went to Rechterman's office and asked if it met her expectations. *Ibid.* Rechterman responded that she did not know why Bouamama was sent to her department, and directed him to speak with Franklin about why he did not get a Sales Supervisor position. *Ibid.* Bouamama went to Franklin's office as directed, where Franklin told him "[o]h, I thought I took care of you." *Id.* at 72. Bouamama asked why he did not get the Sales Supervisor position, and Franklin told him that he needed to go speak to Rechterman. *Id.* at 73. Bouamama responded that he was "tired of all this," and, as his shift had ended, he went home. *Ibid.*

On April 17, 2003, Bouamama met with Slezak and Franklin. Gov't C.A. Supp. E.R. 75. Slezak told him "[y]ou did not get the Sales Supervisor position and you're not going to go back to the [sales] floor," and she offered Bouamama the severance package. *Ibid.* Bouamama asked if he was being terminated, and they responded "effective today immediately. You [are] no longer with the company." *Id.* at 76.

b. At the close of the evidence before the district court, petitioner made a Rule 50(a) motion, arguing "[w]ith regard to the Commission's retaliation claim":

> [T]here hasn't been any evidence that Miss Slezak told any other panel members regarding the alleged reports made to her by Mr. Bouamama. Mr. Franklin and Mr. Villeneuve both testified that, in fact, Miss Slezak had not reported any protected activity to them, and without this knowledge, knowledge by one of three panel members is insufficient for the jury to return a verdict on retaliation.

Gov't C.A. Supp. E.R. 112. This was the entirety of peti-

tioner's argument in support of its Rule 50(a) motion on the Commission's retaliation claim. The court stated it would take "that motion under advisement but submit the case to the jury." *Ibid.*

The jury returned a verdict in favor of the Commission on its retaliatory discharge claim (based on petitioner's failure to permit Bouamama to return to the Sales Representative position), but found for petitioner on the remaining claims. Gov't C.A. Supp. E.R. 8-12.

2. As relevant here, petitioner moved for judgment as a matter of law under Rule 50(b). Pet. C.A. E.R. 20-34. In its Rule 50(b) motion and in support of its motion for a new trial, petitioner argued, as it had in support of its Rule 50(a) motion, that the evidence was insufficient to show that Franklin had knowledge of Bouamama's complaints to Slezak (and hence the complaints could not have caused Bouamama's termination). *Id.* at 26-27. In addition, petitioner argued for the first time that (among other things) the evidence was insufficient to demonstrate that Bouamama engaged in activity protected under Title VII. *Id.* at 21-24.

The district court denied petitioner's Rule 50(b) motion. Pet. App. 43-64. As relevant here, the district court refused to address petitioner's argument that the Commission failed to introduce sufficient evidence to establish that Bouamama engaged in activity protected under Title VII, holding that the argument was not properly before the court because petitioner had not raised it in its Rule 50(a) motion. *Id.* at 44-45 (citing *Freund* v. *Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003)).

3. The court of appeals affirmed in a divided opinion.[2] Pet. App. 1-40. As relevant here, the court began with settled law that a Rule 50(b) motion for judgment as a matter of law may only be based on arguments presented in a Rule 50(a) motion, because a Rule 50(b) motion is properly understood as a renewed Rule 50(a) motion. *Id.* at 19-20. Accordingly, the court of appeals reviewed only for plain error petitioner's claim that Bouamama did not engage in protected activity—a standard of review the court of appeals described as "extraordinarily deferential" and "limited to whether there was *any* evidence to support the jury's verdict." *Id.* at 20, 23 (quoting *Yeti by Molly Ltd.* v. *Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir. 2001)).

The court of appeals rejected petitioner's argument that Bouamama's complaint did not constitute protected activity under the standard enunciated in *Clark County School District* v. *Breeden*, 532 U.S. 268 (2001) (per curiam). The court explained that under the *Breeden* standard, complaints about only isolated incidents are not protected "unless a reasonable person would believe that the isolated incident violated Title VII." Pet. App. 25. The court elaborated that the reasonable person determination requires examination of "all the circumstances," including the frequency and severity of the conduct. *Ibid.* (quoting *Breeden*, 532 U.S. at 270-271).

The court of appeals disagreed with petitioner's narrow characterization of the protected conduct at issue, explaining that it was not, as petitioner had asserted, "at most, a complaint about an 'offhand comment' or an 'isolated incident.'" Pet. App. 25-27. Rather, the court rec-

[2] The Commission cross-appealed the district court's denial of equitable reinstatement relief, see Pet. App. 57-59, but dismissed the cross-appeal before oral argument.

ognized, Bouamama's "actual testimony" was that "he complained to Slezak two or three times" about comments relating to his religion and national origin. *Id.* at 26. Moreover, although Bouamama had not complained about Villeneuve's comment that "[t]he Muslims need to die," Bouamama testified that he did not do so because of the "culture in Go Daddy. You complain you get fired." *Ibid.* The court noted that the fact that Bouamama did not complain about these comments "d[id] not make them irrelevant to the inquiry concerning the reasonableness of his belief that a violation of Title VII had occurred." *Ibid.*

Concentrating on the surrounding context, the court of appeals observed that Franklin's comments "were not 'isolated' from the terms and conditions of Bouamama's employment," because Bouamama had just been told that "his position had been eliminated and that his only option to avoid demotion involved an application process to be headed by Franklin." Pet. App. 26-27. This demonstrated a "strong nexus between Franklin's comments and the terms of Bouamama's continued employment, as noted by Bouamama himself in his final report to Slezak." *Id.* at 27. Taking the comments and circumstances together, the court of appeals found the evidence at trial was sufficient to "satisf[y] the 'any evidence' standard applicable to a faulty Rule 50(b) motion." *Id.* at 27 (quoting *Yeti by Molly*, 259 F.3d at 1109).

Judge Noonan dissented on the facts presented. Pet. App. 32-40. He "accept[ed] the majority's view that [the court] review[ed] the jury's verdict under the plain error standard." *Id.* at 40. But, disagreeing with the majority's characterization of the evidence, Judge Noonan found nothing he believed could be "construe[d] * * * as 'discriminatory behavior.'" *Id.* at 35. He viewed Vil-

leneuve's comments about how "Muslims need to die" as random remarks not directed at Bouamama and "irrelevant" to the retaliation claim. *Id.* at 35-36. Similarly, Judge Noonan regarded Villeneuve's and Franklin's comments to Bouamama about his national origin and religion as separate, "isolated incident[s]." *Id.* at 37.

ARGUMENT

The fact-bound decision of the court of appeals upholding the jury's verdict is correct and does not conflict with any decision of this Court or of another court of appeals. Petitioner relies entirely on the principles that "offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment," and that a complaint about the same is not protected activity for purposes of Title VII's antiretaliation provision, 42 U.S.C. 2000e-3(a). *E.g.*, Pet. 20-21. But those principles—applicable to complaints about a hostile work environment—do not apply here, where Bouamama complained about what he reasonably believed was a discriminatory change to the formal terms and conditions of his employment, *i.e.*, elimination of his Inbound Sales Manager position. Thus, the jury's verdict here was amply justified by the Commission's showing that Bouamama's complaints were based on his reasonable belief that his job was being eliminated by a manager who made comments indicative of prejudice against Bouamama's religion and national origin. As Bouamama himself put it: "[T]his guy here [Franklin], I don't know him and two days ago he came and telling [sic] me that he doesn't care about my history and he wanted to eliminate my position. The next day he's taking interest for

who I am and where I'm from. So I wanted [Slezak] to look into it." Gov't C.A. Supp. E.R. 64.

In any event, the argument petitioner now makes was not offered in its Rule 50(a) motion. That forfeiture precludes this Court from reexamining the jury's verdict. Although the court of appeals applied "plain error" review, that was too generous to petitioner; under this Court's precedents, Rule 50 and the Seventh Amendment do not permit *any* appellate review of a federal civil jury verdict on grounds not raised in a Rule 50(a) motion. Further review is not warranted.

1. The Commission introduced sufficient evidence to support the jury's verdict against petitioner on the Commission's retaliatory discharge claim.

a. Title VII's antiretaliation provision makes it "an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. 2000e-3(a). This Court has assumed that Title VII's antiretaliation provision extends protection for employee opposition conduct "not just to practices that are actually 'made . . . unlawful' by Title VII, but also to practices that the employee could reasonably believe were unlawful." *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 270 (2001) (per curiam) (citation omitted). This reasonable-belief legal standard for protected activity—which petitioner has never disputed—is routinely applied by the courts of appeals. See, *e.g.*, Pet. App. 25 (discussing *Breeden*, 532 U.S. at 270-271); *Wilkerson* v. *New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 322 (3d Cir. 2008); *Kessler* v. *Westchester County Dep't of Soc. Servs.*, 461 F.3d 199, 210 (2d Cir. 2006); *Jordan* v. *Alternative*

Res. Corp., 458 F.3d 332, 338-343 (4th Cir. 2006), cert. denied, 549 U.S. 1362 (2007).

b. Here, the evidence showed that Bouamama reasonably believed, based principally on Franklin's comments about Bouamama's religion and national origin, that Franklin was eliminating Bouamama's Inbound Sales Manager job because of Bouamama's religion or national origin. Eliminating a position because of the current occupant's religion or national origin is unlawful under Title VII. See 42 U.S.C. 2000e-2(a) ("It shall be an unlawful employment practice for an employer * * * to discriminate against any individual with respect to * * * terms, conditions, or privileges of employment, because of such individual's * * * religion * * * or national origin.").

As the jury heard, on several occasions Bouamama faced or heard inquiries and negative comments about his religion and national origin. In early 2002, after overhearing Bouamama speaking another language, Villeneuve asked Bouamama where he was from and what religion he practiced. Gov't C.A. Supp. E.R. 51-52. On another occasion, Villeneuve commented to a group of employees, with Bouamama present, that "[t]he Muslims need to die" or "[t]he bastard Muslims need to die." *Id.* at 58. A jury could infer that those episodes would make an employee such as Bouamama reasonably understand that inquiries about his religion and national origin were likely linked to prejudice against those characteristics.[3]

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[3] Petitioner suggests that "[b]ecause Bouamama never complained about the remark, it simply cannot be the basis of protected activity." Pet. 31. But whether or not Bouamama reported Villeneueve's comment, it still made reasonable Bouamama's belief that inquiries like Villeneueve's—and later, Franklin's—were indicative of prejudice.

Then, in early April 2003, after Franklin met Bouamama face-to-face for the first time, Franklin cancelled his future meetings with Bouamama, and Franklin reversed course on his plan to leave Bouamama's job in place. Gov't C.A. Supp. E.R. 20-21, 22, 43-44, 61-62. In the days that followed, Franklin informed Bouamama that his position was being eliminated and he "didn't care about [Bouamama's] background or history with the company," *id.* at 62-63; Franklin also asked Bouamama—just like Villeneuve had—if Bouamama was a Muslim from Morocco, and when Bouamama answered yes to both questions, Franklin responded "[y]ou know, you're lucky that I like you," *id.* at 63.

On this evidence, the jury could conclude that Bouamama reasonably believed that Franklin harbored animus against Bouamama because of his national origin and religion, and that that prejudice prompted Franklin's decision to eliminate Bouamama's position. In particular, a jury could conclude it was reasonable for Bouamama to believe (1) that Franklin—who asked the same religion and national origin questions as Villeneuve—harbored anti-Moroccan or anti-Muslim prejudice like that displayed by Villeneuve's "Muslims need to die" comment, and (2) that such bias was behind Franklin's decision to eliminate Bouamama's job without any regard for Bouamama's history with the company.[4]

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[4] Petitioner also objects (Pet. 36, 38) that because Franklin decided to eliminate Bouamama's position before Bouamama complained to Slezak, Bouamama's termination could not have been based on a discriminatory motive. But that ignores ample evidence at trial that Franklin's decision to eliminate Bouamama's position was distinct from the company's ultimate decision to terminate his employment. See Pet. App. 29-31. In any case, that fact-bound issue does not warrant this Court's review.

c. Petitioner repeatedly objects (Pet. 12-14, 34-36) that the foregoing explanation of how the evidence supported the jury's retaliation verdict amounts to a "new argument on appeal"—suggesting there is something novel about the idea that Bouamama's complaint about Franklin encompassed not only Franklin's comments, but also Franklin's elimination of Bouamama's Inbound Sales Manager position. But there is nothing novel to the explanation. The Commission's argument at trial was simply that Bouamama complained about Franklin's conduct, and then petitioner terminated his employment. It was Bouamama's own testimony (see p. 6, *supra*) that established the precise nature of his complaint—which certainly included Bouamama's concern that "[Franklin] doesn't care about my history and he wanted to eliminate my position," Gov't C.A. Supp. E.R. 64. Petitioner's assertion that the Commission's closing argument focused "solely on the purported *offensiveness* of Franklin's *comments*," Pet. 35, is similarly misplaced. The portion of the transcript petitioner cites comes from the Commission's closing argument on its discrimination claims, not its closing argument on the retaliation claim.

In any event, petitioner did not suggest to the court of appeals that the Commission's explanation of the sufficiency of the evidence was somehow inappropriate, and there is no reason for this Court to take up that contention now. See, *e.g.*, *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33, 39 (1989) (declining to address argument not raised in court of appeals).

2. Petitioner contends (Pet. 20-41) that the court of appeals' decision conflicts with this Court's decision in *Breeden* and decisions similar to *Breeden* from other courts of appeals. Petitioner is mistaken. *Breeden* and the courts of appeals decisions petitioner cites are

inapposite because they concern employee complaints about one type of unlawful employment practice (a hostile work environment), while Bouamama complained about another type of unlawful employment practice (discriminatory change to the formal terms and conditions of his employment by outright elimination of his Inbound Sales Manager position). Those different factual situations call for different legal analyses.

a. A hostile work environment based on discriminatory harrassment is an "unlawful employment practice [under Title VII]," 42 U.S.C. 2000e-3(a). See, *e.g.*, *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 786 (1998) "[Harassment] so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment' violates Title VII.") (quoting *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 64 (1986)) (brackets in original; citation omitted). So too, discriminatory elimination of an employee's position is an "unlawful employment practice [under Title VII]," 42 U.S.C. 2000e-3(a), because eliminating an employee's position typically results (at a minimum) in a change to the "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1).

But the similarities between those two unlawful employment practices end when it comes to the merits inquiry Title VII prescribes. "[W]hether an environment is sufficiently hostile or abusive" to violate Title VII requires "'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher*, 524 U.S. at 787-788 (quoting *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

By contrast, no analogous factual assessment is necessary to decide whether the discriminatory elimination of a position violates Title VII. Eliminating an employee's position almost by definition changes the "terms, conditions, or privileges of employment," 42 U.S.C. 2000e-2(a)(1); if it was done for discriminatory reasons, Title VII makes it unlawful.

In other words, *Harris* and *Faragher* recognize that "discourtesy or rudeness should not be confused with racial harassment," *Faragher*, 524 U.S. at 787 (alteration and citation omitted), because only the latter is an unlawful change in the terms or conditions of employment. But outright elimination of an employee's position poses no such line-drawing exercise.

b. That critical difference carries over when *Breeden*'s overlay for retaliation claims is put in place: For a complaint about a hostile environment to be protected activity, the employee must "reasonably believe" that the complained-of harassment met the hostile-work-environment standard above. *Breeden*, 532 U.S. at 270. Thus, in *Breeden* this Court considered whether an employee's complaint—made in response to her supervisor's and co-worker's comments about a sexual reference in an employee application file—was protected activity. *Id.* at 269-271. The Court concluded that the complaints were not protected activity: "No reasonable person could have believed that the single incident * * * violated Title VII[]" because the supervisor's and co-worker's comments were "at worst an 'isolated inciden[t]' that cannot remotely be considered 'extremely serious'" as *Faragher* requires. *Id.* at 271 (second set of brackets in original; citation omitted).

By contrast, an employee's complaint that his position is being eliminated for a discriminatory reason—

Bouamama's complaint here—is protected activity so long as (1) he reasonably believes that his position is being eliminated (indisputably true, as Bouamama was told exactly that, see Gov't C.A. Supp. E.R. 62-62.5, 64) and (2) he reasonably believes it was on the basis of a protected characteristic (here, Bouamama's religion or national origin). Bouamama summed that up in his own testimony: "[T]his guy here [Franklin], I don't know him and two days ago he came and telling me that he doesn't care about my history and he wanted to eliminate my position. The next day he's taking interest for who I am and where I'm from. So I wanted [Slezak] to look into it." *Id.* at 64.

Breeden is therefore largely inapposite. Indeed, petitioner's effort to analyze this case under *Breeden*'s framework is no more sensible than rejecting a retaliation claim by an employee who is fired for objecting to his employer's policy of giving every white employee an extra two weeks of vacation, on the theory that *Breeden* absolutely requires a showing of racial harassment in the workplace for any retaliation claim. While the latter showing would be sufficient to support a retaliation claim, it is simply not necessary when (as here) the employee complains about another kind of unlawful employment practice.[5]

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[5] Although the court of appeals did not expressly treat Bouamama's complaints as categorically different from *Breeden*-like complaints of a hostile work environment, its analysis is quite consistent with that approach. The court of appeals put special emphasis on the "context in which [Franklin's comments] were made," and identified Bouamama's awareness that "his position had been eliminated and that his only option to avoid demotion involved an application process to be headed by Franklin." Pet. App. 26-27. That "strong nexus between Franklin's comments and the terms of Bouamama's continued employment," *id.* at

c. Nor does petitioner demonstrate a conflict with any decision of another court of appeals. Many decisions it cites do not even address retaliation claims. See *Al-Zubaidy* v. *TEK Indus., Inc.*, 406 F.3d 1030, 1036 (8th Cir. 2005) (retaliation claim abandoned on appeal); *Canady* v. *Wal-Mart Stores, Inc.*, 440 F.3d 1031 (8th Cir. 2006); *Ngeunjuntr* v. *Metropolitan Life Ins. Co.*, 146 F.3d 464 (7th Cir. 1998). The few decisions that do address retaliation claims do not involve a direct change to the formal terms or conditions of employment like the elimination of Bouamama's Inbound Sales Manager position here; rather, in each case the plaintiff employee's complaint was about his or her work environment. See *Jordan*, 458 F.3d at 339-340 (retaliation claim predicated on co-worker's isolated racist exclamation); *George* v. *Leavitt*, 407 F.3d 405, 416-417 (D.C. Cir. 2005) (retaliation claim predicated on complaints about "confrontations with [plaintiff's] co-workers and [plaintiff's] allegation that she was thrice told to 'go back where she came from'").

Like *Breeden*, those cases evaluate "all the circumstances," *Harris*, 510 U.S. at 23, to determine whether the environment was hostile enough that a reasonable person could believe it amounted to a change in the terms and conditions of employment. And like *Breeden*, those cases do not speak to the proper analysis when an employee, such as Bouamama here, complains about an unlawful employment practice different from a discriminatorily hostile work environment.

3. In any event, petitioner's central contention—that the evidence at trial was insufficient as a matter of

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21, is precisely what sets this case far apart from the facts of *Breeden* and similar cases.

law to establish that Bouamama engaged in protected activity—is not suitably presented for review. Petitioner did not make this argument in a pre-verdict motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). It is therefore forfeited. As petitioner tacitly concedes, this Court's review of the claim in the petition would (at best) be only for plain error. Correctly understood, however, Rule 50, the Seventh Amendment, and this Court's cases preclude *any* appellate reexamination of a federal civil jury verdict on grounds not advanced in a Rule 50(a) motion. Regardless of whether this Court would be constrained to apply plain error review, or would be entirely unable to consider the merits of the question presented, this case is an unattractive vehicle for the Court to reach any significant legal question.

a. A post-verdict motion under Rule 50(b) for judgment as a matter of law is a renewal of a pre-verdict Rule 50(a) motion, and is conditioned on making a Rule 50(a) motion. This is dictated by Rule 50(b) itself: "If the court does not grant a motion for judgment as a matter of law made under subdivision (a), * * * [t]he movant may renew its request for judgment as a matter of law * * * after the entry of judgment." Fed. R. Civ. P. 50(b) (effective Dec. 1, 2006).[6]

Moreover, the practice of the court reserving judgment on the Rule 50(a) motion and the movant renewing its request in a Rule 50(b) motion is required by the Seventh Amendment, which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of

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[6] This version of the Rule was in effect at the time of the December 2006 trial in this case. The Rule has since been restyled without significant substantive change. See Fed. R. Civ. P. 50 advisory committee's notes (2007, 2009).

the United States, than according to the rules of the common law," U.S. Const. Amend. VII. Granting a post-judgment motion for judgment contrary to the jury's verdict would be inconsistent with the Seventh Amendment. See *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364 (1913). But the "rules of the common law" preserved by the Seventh Amendment did include "a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved." *Baltimore & Carolina Line* v. *Redman*, 295 U.S. 654, 659 (1935). "[U]nder this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict." *Ibid.*; see *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 250 & n.7 (1940). A pre-verdict motion is thus a constitutional prerequisite to a post-verdict entry of judgment as a matter of law, and failure to make a motion under Rule 50(a) precludes obtaining post-verdict judgment as a matter of law.

For that reason, arguments not pressed on a Rule 50(a) motion are forfeited for purposes of a Rule 50(b) motion. See Fed. R. Civ. P. 50(b) (effective Dec. 1, 2006) ("If the court does not grant a motion for judgment as a matter of law made under subdivision (a), the court is considered to have submitted the action to the jury subject to the court's later deciding *the legal questions raised by the motion*.") (emphasis added). The advisory committee notes to Rule 50 reinforce this limitation: "A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." Fed. R. Civ. P. 50 advisory committee's note (1991); see also Fed. R. Civ. P. 50 advisory committee's note (2006)

("Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion."). This rule of forfeiture is recognized and enforced by every court of appeals.[7]

The Commission's retaliation claim had three elements: (1) that Bouamama engaged in protected activity; (2) that petitioner took adverse employment action against him; and (3) that the protected activity was a substantial or motivating factor in the adverse employment action. See Pet. C.A. Supp. E.R. 5 (jury instructions). Petitioner's Rule 50(a) motion was directed only at the last of these elements—specifically to whether the decisionmakers who terminated Bouamama were aware of his protected activity. See p. 8, *supra*. Petitioner did not argue until after the jury's verdict that the evidence was insufficient to establish the first element of the Commission's retaliation claim. Pet. App. 44. The district court was therefore correct to reject at the

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[7] See *Systematized of New England* v. *SCM, Inc.*, 732 F.2d 1030, 1035-1036 (1st Cir. 1984); *Cruz* v. *Local Union No. 3 of IBEW*, 34 F.3d 1148, 1155 (2d Cir. 1994); *Orlando* v. *Billicon Int'l, Inc.*, 822 F.2d 1294, 1297-1298 (3d Cir. 1987); *Tights, Inc.* v. *Acme McCrary Corp.*, 541 F.2d 1047, 1058 (4th Cir.), cert. denied, 429 U.S. 980 (1976); *Morante* v. *American Gen. Fin. Ctr.*, 157 F.3d 1006, 1010 (5th Cir. 1998); *Preferred RX, Inc.* v. *American Prescription Plan, Inc.*, 46 F.3d 535, 544 (6th Cir. 1995); *Parts & Elec. Motors, Inc.* v. *Sterling Elec., Inc.*, 826 F.2d 712, 716-717 (7th Cir. 1987); *Jones Truck Lines, Inc.* v. *Full Serv. Leasing Corp.*, 83 F.3d 253, 258 (8th Cir. 1996); *Freund* v. *Nycomed Amersham*, 347 F.3d 752, 760-762 (9th Cir. 2003); *Karns* v. *Emerson Elec. Co.*, 817 F.2d 1452, 1455 n.2 (10th Cir. 1987); *Collado* v. *UPS*, 419 F.3d 1143, 1158 (11th Cir. 2005); *United States Indus., Inc.* v. *Blake Constr. Co.*, 671 F.2d 539, 548 (D.C. Cir. 1982); *Duro-Last, Inc.* v. *Custom Seal, Inc.*, 321 F.3d 1098, 1105-1106 (Fed. Cir. 2003).

threshold petitioner's Rule 50(b) motion on that latter, forfeited ground. *Ibid.*

b. The court of appeals recognized petitioner's forfeiture. Pet. App. 22-23. It suggested that it could nonetheless review the verdict "under the deferential plain error standard applicable to arguments not made in a Rule 50(a) motion." *Id.* at 23. Under that "extraordinarily deferential" standard, "review * * * is limited to whether there was *any* evidence to support the jury's verdict." *Id.* at 20, 23 (quoting *Yeti by Molly Ltd.* v. *Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir. 2001)). Petitioner does not now challenge the court of appeals' forfeiture finding or its holding that plain error review applies. Assuming *arguendo* that the latter holding is correct (but see pp. 24-26, *infra*), the plain error posture makes this an unattractive vehicle for this Court's review.

c. Although the court of appeals' affirmance on the merits of the district court's judgment was correct, there is a more fundamental reason that the district court's judgment on the question presented should be affirmed: Petitioner's forfeiture absolutely precluded the court of appeals (and would preclude this Court) from reviewing petitioner's challenge to the verdict. The court of appeals' "plain error" concept does not apply to a case in this posture because, even if the record had contained *no* evidence supporting the first element of the Commission's retaliation claim, the district court would have committed no "error," plain or otherwise, in refusing to disturb the jury's verdict on a ground not identified in petitioner's pre-verdict Rule 50(a) motion. Rule 50's strict preservation requirements fully supported the district court's judgment, and the court of appeals should have looked no further. Indeed, appel-

late review on the merits, however deferential, risks nullifying the Rule's clear and constitutionally compelled preservation requirements.

This Court has recognized as much. In *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), the Court categorically rejected the "suggestion that * * * the courts of appeals [may] consider the sufficiency of the evidence underlying a civil jury verdict notwithstanding a party's failure to comply with Rule 50." *Id.* at 402 n.4.[8] Permitting such appellate examination would contradict the principle that "[d]etermination of whether * * * judgment [should be] entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Cone* v. *West Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947). And *Unitherm* further recognizes that a plain error approach could raise serious Seventh Amendment concerns because, at common law, an appellate court could only reverse a trial court's legal errors—such as a "trial court's *ruling* respecting the sufficiency of the evidence"—but could not review issues of fact and itself direct a verdict for the defendant. 546 U.S. at 403 n.4 (quoting *Baltimore & Carolina Line*, 295 U.S. at 658).

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[8] In *Unitherm*, this Court held that the court of appeals has no power to award a new trial when the appellant failed to make a proper Rule 50(b) motion (or a Rule 59 motion for a new trial). 546 U.S. at 396. *Unitherm*'s principles apply *a fortiori* to petitioner, because petitioner seeks greater relief than the *Unitherm* appellant (not merely a new trial, but entry of judgment in its favor) after committing at least as grave a forfeiture as the *Unitherm* appellant (not merely failing to renew its Rule 50 motion after verdict, but failing to make the constitutionally necessary pre verdict motion to begin with).

The court of appeals therefore was constrained to reject on purely procedural grounds the claim petitioner now presses. The petition should be denied because petitioner's forfeiture would similarly preclude this Court's examination of the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

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In The

Supreme Court of the United States

GO DADDY SOFTWARE, INC.,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the Petition for a Writ of Certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Respondent's opposition to Go Daddy's Petition for Writ of Certiorari goes to great lengths to neither defend nor adopt the rationale of the two-to-one Ninth Circuit opinion below. Instead, Respondent advances a new, but still flawed theory that the court of appeals neither considered, nor decided. Respondent then argues that the court of appeals was not permitted to review the trial court decision even under the plain error standard – despite clear precedent to the contrary. Respondent's extraordinary effort to distance itself from the court of appeals decision is not surprising given Judge Noonan's description of the jury verdict as a "miscarriage of justice," and his observation that the panel majority "flout[ed]" three well-established decisions by this Court, including the Court's *per curiam* opinion in *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Respondent's eleventh hour "non-defense" of the ruling below, stands as further support for why review by this Court is necessary.

The panel majority held that Mr. Bouamama's complaint to his employer's personnel department amounted to "protected activity" under Title VII because it was reasonable for him to believe that the Company was discriminating against him. [APP.26.] To reach this conclusion, the court of appeals relied exclusively on the "totality of circumstances" test in *Breeden*, in which this Court held that "'offhand

comments, and isolated incidents (unless extremely serious)' do not amount to discrimination." [APP.25 (quoting *Breeden* at 271).] Specifically, the court of appeals reasoned that the conduct to which Mr. Bouamama had been subjected at Go Daddy "went beyond mere 'offhand comments' and 'isolated incidents,'" [APP.27 (quoting *Breeden* at 271),] and "therefore" that "two, and possibly three, complaints" to his employer met the *Breeden* standard of protected activity. [*Id.*] The court of appeals cited no other standard to reach this conclusion. Applying the same standard, yet coming to the opposite conclusion, Judge Noonan's analysis also focused exclusively on whether the "totality of the circumstances" standard in *Breeden* had been met. [APP.38-39.]

Despite both the majority and the dissent's exclusive application of *Breeden* to the facts in this case, Respondent now argues that *Breeden* is "inapposite." [Opp. at 19.] According to Respondent, the *Breeden* standard need not be met because the *singular* complaint at issue in this case was *not* about Mr. Bouamama's "work environment," but rather about "another kind of unlawful employment practice." [*Id.*] That theory, however, was neither decided nor explicitly considered by the court of appeal, and therefore is not subject to review by this Court. The issue in this case is whether Judge Noonan was correct in concluding that the panel majority's application of the *Breeden* standard flouts this Court's well-established precedent that a complaint about "offhand comments and isolated incidents" is not protected activity for

purposes of Title VII's anti-retaliation provision. [APP.33, 36-37.]

Even assuming, arguendo, that Respondent's new theory of the issue before the Court is properly presented for review, the legal flaw in the jury's verdict is the same and Go Daddy's Petition for Certiorari should be granted: Mr. Bouamama's complaint could not have been a reasonable one under this Court's precedent, regardless of whether he was complaining about the elimination of his job, or about a hostile work environment, because the manager who decided to eliminate his position did so **before** he allegedly asked Mr. Bouamama **any** questions regarding his national origin, or his religion. [GD ER106.] In other words, no reasonable person could believe that he was selected for job elimination because of his religion or national origin if the alleged discriminator did not even ask questions about those topics until **after** the decision. [*Id.*] Thus, based on the sequence of the decision and the questions ***alone***, Mr. Bouamama's complaint that the decision was based on unlawful considerations of his national origin and religion was objectively unreasonable. Therefore, Respondent's new theory cannot, as a matter of law, constitute protected activity under this Court's well-established precedent construing Title VII.

Secondly, apparently concerned about the vulnerability of the court of appeals' analysis under *Breeden*, Respondent commits most of its argument in opposition to its claim that the court of appeals erred

by granting *any* appellate review to the jury's verdict – even under the extremely deferential plain error standard. Respondent further argues that such a case is both inappropriate for review by this Court and constitutes a threat to the Seventh Amendment of the Constitution. Respondent provides no support for these hyperbolic and novel theories; indeed, at least two cases reviewed by this Court were decided on a plain error standard by the appellate courts below.

This Court has repeatedly rejected the theory that Title VII operates as a "general civility code" for the American workplace. Given the Ninth Circuit's insistence on applying a pre-*Breeden* standard against the instruction of this Court, and the importance of this issue to the American workplace – particularly given the recent rise of retaliation claims, an authoritative resolution of the question by this Court is required to ensure that Title VII law in the Ninth Circuit remains aligned with this Court and with that of other Circuits.

I. The Undisputed Sequence of Events Cannot, as a Matter of Fact or Law, Support Mr. Bouamama's Reasonable Belief that a Title VII Violation Occurred Under the Standard in *Breeden* or Otherwise

There is no dispute that the questions Mr. Bouamama's new manager Craig Franklin allegedly asked him about his religion and national origin were asked of Mr. Bouamama on April 7, 2003, three days **after**

Mr. Franklin, Mr. Villeneuve, and Heather Slezak, Go Daddy's director of personnel, had already met with Mr. Bouamama to inform him that his position had been eliminated.[1] Yet, Respondent now relies exclusively on Mr. Franklin's questions on that day to argue that "the evidence showed that Bouamama reasonably believed, based **principally** on Franklin's comments about Bouamama's religion and national origin, that Franklin was **eliminating** Bouamama's Inbound Sales Manager job **because of** Bouamama's religion or national origin." [Opp. at 14 (emphasis added).] This argument must fail as a matter of law and logic because – as Mr. Bouamama's testimony proves – Mr. Franklin had not even asked Mr. Bouamama about his religion or national origin, until **after** he decided to eliminate his position. Moreover, Respondent omits the exchange between Respondent and Mr. Bouamama immediately following the above testimony:

> Q: So you told – you told her this was the second time that somebody had complained – had **made comments** about you?
>
> A: That was, I would say, the second or third time that I spoke to her about some matters like that.

---

[1] That Go Daddy eliminated Mr. Bouamama's Inbound Sales Manager position on April 4, 2003, three days before he engaged in protected activity, was thrice confirmed by the District Court. *See* [APP.54, 55, 57.]

> Q: So you had gone to Miss Slezak to complain about **comments about your national origin and religion** before?
>
> A: That's correct. [ER108.]

Mr. Bouamama's testimony makes clear that his alleged complaint to Ms. Slezak on April 7 was not because of the elimination of his position, but because someone had "made comments" about his "national origin and religion." [*Id.*]

Mr. Bouamama testified that Mr. Franklin **first** told him he wanted to eliminate his position and "**the next day**" took an interest in "who he was" and "where he was from." [EEOC SER64.] Under Respondent's theory, how could Mr. Bouamama have reasonably believed that the decision to eliminate his position was made for unlawful reasons when those reasons were as yet **unknown** to Mr. Franklin, the undisputed decisionmaker? Based on the timing of the decision and the alleged conversation alone, Respondent's argument that Mr. Bouamama's complaint to Ms. Slezak on April 7 constituted "protected activity" must fail.

No doubt the panel majority agreed that the timing of Mr. Franklin's questions was insufficient by itself to support a reasonable belief by Mr. Bouamama that Mr. Franklin harbored animus against him at the time he decided to eliminate his position. If the court had relied on Respondent's view that Mr. Franklin's comment alone was sufficient, the court would have had no reason to apply *Breeden*, or to look

beyond Mr. Franklin's questions, to "all the circumstances," including comments made by Mr. Villeneuve over a year earlier.[2]

Rather than rely on Mr. Franklin's April 7th questions alone, as Respondent now suggests, the court of appeals focused on the "totality of the circumstances" and reasoned that "if a person has been subjected to more than one comment, and if those comments, taken together, would be considered by a reasonable person to violate Title VII, that person need not complain specifically about all of the comments to which he or she has been subjected . . . We do not read *Breeden* to require more." [APP.27.]

It is telling that Respondent made no effort to defend this aspect of the panel majority's analysis.

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[2] In December 2001 or early 2002, Mr. Villeneuve overheard Mr. Bouamama talking with a caller in French and asked him what languages he spoke. [APP.34-35.] When he answered, "French and Arabic," Mr. Villeneuve allegedly asked where Mr. Bouamama was from and what religion he practiced. [APP.35.] Mr. Bouamama testified that six months later he told Ms. Slezak about Villeneuve's questions – in the meantime, Mr. Villeneuve (who had also hired Mr. Bouamama) had given Mr. Bouamama a promotion and a big increase in salary). [APP.35.] Mr. Bouamama also testified that sometime after September 11, 2001, he overheard Mr. Villeneuve talking to other employees and saying, "The Muslims need to die. The bastard Muslims need to die." [APP.5; EEOC SER58.] Mr. Bouamama was not the addressee of the comment and did not report it. Indeed, at trial, in light of the events of September 11, he admitted that he could "understand" the anger people had expressed after the 9/11 terrorist attacks and **never complained** about the comment. [APP.6.]

As this Court has consistently held, there is no question that *Breeden* requires much more than the evidence reflected in the record here. Indeed, subsequent cases in other Circuits, and prior decisions by this Court, have emphasized that, "[Title VII] prohibits ***severe or pervasive*** harassment; it does not mandate a happy workplace." *Jensen v. Potter*, 435 F.3d 444, 451 (3d Cir. 2006) (emphasis added) (citing *Faragher*, 524 U.S. at 788; *Harris*, 510 U.S. at 21).

II. This Court Should Decline to Consider Respondent's Newly Raised Argument that *Breeden* Does Not Apply

Apparently concerned that the court of appeals erred in its analysis, Respondent has abandoned its argument that Mr. Bouamama's complaint "satisfied the requirements in *Breeden*" [EEOC Brief at 37] and now argues that analyzing this case under Breeden is not "sensible," [Opp. at 19,] urging this Court to affirm the decision below despite Respondent's view that *Breeden* does not provide the "proper analysis" to the facts at issue here. [*Id.* at 20.] Yet, the Commission argued to the court of appeals below that Mr. Bouamama's complaint "satisfied the requirements of *Breeden*." [EEOC Brief at 37.]

This Court has consistently confined itself to review of arguments both presented to and ruled on by the lower courts. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (declining to consider issues neither raised before nor considered by the Court of

Appeals) (citations omitted). There can be no dispute that both the majority and the dissent focused their entire analysis on whether the "totality of the circumstances" standard in *Breeden* was met. [APP.24-27; 34-40.] Indeed, Respondent admits that the court of appeals opinion focused on the "surrounding context." [Opp. at 11.] The totality-of-circumstances examination is viewed as the "most basic tenet of the hostile-work-environment cause of action." *Williams v. General Motors Corp.*, 187 F.3d 553, 563 (6th Cir. 1999). It is puzzling why the court of appeals would apply this well-known hostile work environment standard if, as Respondent contends, Mr. Bouamama was not complaining about his work environment on April 7, but was instead complaining that the elimination of his job was based on unlawful discrimination.

In an effort to shoe-horn the court of appeals decision into Respondent's new theory of the case, Respondent argues that "[a]lthough the court of appeals did not expressly treat Bouamama's complaints as categorically different from *Breeden*-like complaints of a hostile work environment, its analysis is quite consistent with that approach." [Opp. at 19 n.5.] Respondent's new approach is wholly inconsistent and irrelevant to the analysis applied by both the majority and the dissent as to whether Mr. Bouamama was reasonable in his belief that he was reporting a pattern of discrimination on April 7 under the standard set forth in *Breeden*.

Like the majority, Judge Noonan's dissent also focused exclusively on whether the *Breeden* standard had been met, but rejected the majority's view that Mr. Bouamama was reporting a pattern of discrimination on April 7. Instead, Judge Noonan emphatically concluded that "[n]o rational person could have thought that the two conversations with two different men in different contexts and at widely separated times constituted a pattern of discriminatory conduct by Go Daddy. Even the jury did not think they did, returning an answer of 'No' to the question asking if Go Daddy had discriminated. . . . Bouamama did not report a pattern. At most he reported a single sentence that he deemed discriminatory." [APP.32-33.] As Judge Noonan aptly notes, the jury rejected three of four of the Commission's claims against Go Daddy, including both discrimination claims, and Respondent's claim that Go Daddy failed to promote Mr. Bouamama to the position of Sales Supervisor in retaliation for engaging in protected activities.[3] Therefore, "[i]f Bouamama did not report discrimination, what did Go Daddy retaliate against?" [*Id.* at 33.]

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[3] The jury returned a verdict in favor of Respondent on its retaliatory discharge claim, based on Mr. Bouamama's termination, not based on Go Daddy's failure to permit Bouamama to return to the Sales Representative position, as Respondent claims. [GD ER48-49.]

III. The Ninth Circuit's Plain Error Review Was Proper

The Ninth Circuit was well within its authority to review the trial court's denial of Go Daddy's 50(b) motion for plain error. Indeed, this Court has repeatedly recognized that "the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases . . . [for] [c]ertainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result.'" *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

As Judge Noonan noted in his dissent: "Jury verdicts deserve all the deference that the law wisely accords them. But appellate courts, too, have a function in reviewing what the jury did." [APP.40.] Go Daddy made a reasonably narrow 50(a) motion; however, even if no motion had been made, it is well-established that where a party entirely fails to file a Rule 50(a) motion, it is entitled to a review of the issues raised in its Rule 50(b) motion "where there is such plain error apparent on the face of the record that failure to review 'would result in a manifest

miscarriage of justice.'"[4] *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1109 (9th Cir. 2001).

Undoubtedly concerned that the Ninth Circuit erred in its *Breeden* analysis, Respondent spends much of the opposition arguing that this case is an unworthy vehicle for this Court's review based on the standard of review applied by the court of appeals. However, Respondent cites no authority for its claim that "the plain error posture makes this an unattractive vehicle for this Court's review." [Opp. at 24.] Indeed, this Court has often granted certiorari where the court of appeals applied the plain error standard of review below. *See, e.g., McNeil v. United States*, 508 U.S. 106 (1993) (Seventh Circuit reviewed for plain error and this Court granted petition for certiorari); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) (Second Circuit reviewed for plain error and this Court granted petition for certiorari).

Likewise, Respondent fails to cite any authority for its bald claim that the Seventh Amendment precludes appellate reexamination of the verdict in this case. [*See* Opp. at 21.] In both cases cited by

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[4] Go Daddy did not waive its argument that the Commission presented insufficient evidence in support of its retaliation claim. While the district court found Go Daddy had waived certain arguments, that finding was based on an overly strict interpretation of Rule 50(a)(2). *See, e.g., Kusens v. Pascal Co.*, 448 F.3d 349, 361 (6th Cir. 2006) (stating a Rule 50(a) motion should not be reviewed narrowly); *Federal Sav. & Loan Ins. Corp. v. Reeves*, 816 F.2d 130, 138 (4th Cir. 1987) (stating rigid application of the rule is inappropriate).

Respondent, the appellate court improperly entered a directed verdict for a party that did not move for judgment notwithstanding the verdict under Rule 50(b), rather than granting a new trial. [Opp. at 25.] The propriety of Petitioner's 50(b) motion is not disputed and thus the cases cited to the contrary are inapposite. Further, Respondent relies on a footnote in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), to support the contention that this Court has categorically stated that plain-error review violates the Seventh Amendment. [Opp. at 25.] In fact, whether plain-error review violates the Seventh Amendment was not an issue in controversy in *Unitherm*. Footnote 4 of *Unitherm* only noted that a proposed approach to Rule 50(b) motions by the dissenting Justices could present Seventh Amendment "issues." [*Id.*] Accordingly, it is inaccurate to contend this Court "recognizes that a plain error approach could raise serious Seventh Amendment concerns" with respect to review absent a proper Rule 50(a) motion. [*See id.*]

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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